Volume 6 | Issue 1

5-1902

The Forum - Volume 6, Issue 8

THE FORUM.

Vol. VI MAY, 1902 No. 8

Published Monthly by the Students of

THE DICKINSON SCHOOL OF LAW,

CARLISLE, PA.

Subscription, $1.25 per Annum Payable in Advance.

ADVERTISING RATES PER ANNUM:
$30.00 per Page; $15.00 ½ Page; $8.00 ¼ Page; $4.00 ⅛ Page.

Address all Communications to
THE FORUM, CARLISLE, PA.

SCHOOL NOTES.

We publish in this issue the admirable address on the subject, "Glimpses of the History of the Law, Suggestive to the Young Lawyer of To-day," given before the Law School on Friday evening, May 9th, by the Hon. William Penn Lloyd, Treasurer of the State Bar Association. This is the first of a series of lectures to be given under the auspices of the Historical Society of the Dickinson School of Law.

The appropriateness of the theme to the purpose in view, the scholarly and painstaking research of the lecturer, and the value of the discourse to the student body, will be appreciated by the reader, to whom we have thought best to give the lecture in full rather than a review.

Fred. B. Gerber, of the Middle class, has accepted the appointment as historian for the Historical Society.

We regret to announce that ill health has necessitated Vastine, of the Middle class, to return home. We hope that he may soon be restored to health and enabled to resume the work of the school.

A number of volumes of the *National Reporter System* have been added to the library since the last issue.

ALUMNI NOTES.

"Frederick D. Oiler, of Shamburg, well known here, who has been reading law with Hon. R. F. Glenn, of Franklin, has been admitted to practice at the Venango county bar. Mr. Oiler is bright, well educated, up to date, and will undoubtedly make his mark as a lawyer."—*Titusville Courier*. Mr. Oiler graduated in the class of '99.

Charles E. Daniels, '98, of Scranton, was a visitor during the month.

Samuel E. Basehore, '01, of Mechanicsburg, attended the lecture of Hon. Wm. Penn Lloyd, May 9th.

Robert H. Smith, '00, of Oakland, Cal., was in town during the month.

Robert Henderson, '94, was married recently.

BOOK REVIEWS.

Acknowledged—Review will follow.

VOID JUDICIAL SALES. *One volume. Fourth edition. By Hon. A. C. Freeman. Central Law Journal Co., St. Louis, 1902. Price, $4.00*

The following is a continuation of the Moot Court cases:

	Plaintiff	Defendant
No. 136.	Gross,	Williamson,
	Welsh,	Vastine.
	Cisney, J.	
No. 137.	James,	Jacobs, J. W.,
	Lloyd,	White.
	Keelor, J.	
No. 138.	Fox,	Gerber,
	Peightel,	Myers.
	McIntyre, J.	
No. 139.	Thorne,	Osborne,
	McIntyre,	Sterrett.
	Rhodes, J., J.	
No. 140.	Hugus,	Chapman,
	Fleitz,	Bradshaw.
	Sherbine, J.	
No. 141.	Knappenb'ger,	Jacobs, J. H.,
	Albertson,	Flynn.
	Fox, J.	
No. 142.	Claycomb,	Schanz,
	Wright,	Drumheller.
	Kaufman, J.	
No. 143.	Hillyer,	Matthews,
	Miller,	Wilson.
	Gross, J.	
No. 144.	Schnee,	Cooper,
	Kaufman,	Hickernell.
	Longbottom, J.	
No. 145.	Boryer,	Elmes,
	Houser,	Coury.
	Thorne, J.	
No. 146.	Delaney,	Donahoe,
	Cisney,	Longbottom.
	Minnich, J.	
No. 147.	Crary,	Ebbert,
	Miller,	Keelor.
No. 148.	Yocum,	Dively,
	Oldt,	Cook.
	Williamson, J.	
No. 149.	Benjamin,	Hubler,
	Schiffer,	Berkhouse.
	Schanz, J.	
No. 150.	Carlin,	Brundage,
	Lourimer,	Lanard.
	Gerber, J.	
No. 151.	Kline,	Jones,
	Mays,	Hamblin.
	Miller, J.	
No. 152.	Gerber,	Brennan,
	Dever,	Sherbine.
	Vastine, J.	

A GLIMPSE AT THE HISTORY OF THE LAW, SUGGESTIVE TO THE YOUNG LAWYER OF TO-DAY.

BY HON. WILLIAM PENN LLOYD.

To the young lawyer it is of the first importance that he should have an intelligent conception of the dignity and honor of his profession, a conception that, as it deepens and broadens with time, shall become the inspiration of his life work.

There is no richer field in which to nurture and cultivate the worthy ambition that has led him to choose this exalted calling, than the *History* of the Law.

From the time when its infant foot-steps ventured to lead the march of human progress, law has stood first among all the branches of study in training the reason and developing the judgment of mankind.

It now stands as one of the proudest monuments of intellectual achievement, and flashes from its majestic proportions, as its *In Hoc Signo Vinces*, that, "Law is the very reason of the thing, and that which is not reason is not law."

The first historical glimpse of law, resting on this foundation, is the Decalogue, including the Mosaic legislation. Grotius, Blackstone, and other eminent writers on law maintain that this was the Genesis of all human law. A very old code it is indeed; but wherever the race has emerged from the night of barbarism, and in its upward struggles has reached a plane of comparative security and justice, the principles of this ancient code are found to have inspired the laws that accomplished that result. Take from the splendid jurisprudence of this present age of highest civilization, the immortal principles of justice and equity, of the brotherhood of mankind, and of the austere obligations of right, which make lustrous the pages of divine revelation, and there would be little left worth preserving.

The Greeks, with all their genius, their creation in literature, philosophy and art, did little for civilization, which we can

trace in the science of jurisprudence. They were too speculative for such a practical subject as law. But this speculative wisdom was made use of by the stern Roman jurist, so far as philosophy modified law. Yet Roman jurisprudence did not culminate in its serene majesty until the time of the emperors.

Justinian then consolidated it in the Code, the Pandects, and the Institutes. The earliest legislation worthy of notice was the celebrated code called the "Twelve Tables." But scarcely any part of the Civil Law as we now know it, contained in the Twelve Tables, has come down to us. The Code, Pandects, Institutes and Novels of Justinian, comprise the Roman Law, as received in the form given by the School of Bologna, that became the Common Law of Europe.

The Golden Age of Roman jurisprudence was from the birth of Cicero to the reign of Alexander Severus. Before this period, it was an occult science, confined exclusively to praetors, pontiffs and patrician lawyers. But as Law has always flourished where the people had a voice in the government, in the latter days of the Republic, law became the fashionable study of the Roman youths, and consequently eminent masters rose. Among these masters were Varus, Cato, Cæsar, Anthony and Cicero.

These great lawyers, and many others that might be named if time would permit, have shed a grander glory and more enduring benefits upon mankind than all the victories won by the embattled phalanx of that warrior people. Candidates for the bar studied four years under distinguished jurists, and were required to pass a rigorous examination. The judges were chosen from the members of the bar, and the great lawyers were not only learned in the law, but possessed all the other accomplishments that the literature of the day could supply.

To Justinian belongs the immortal glory of reforming the jurisprudence of the Romans. "In the space of ten centuries," says Gibbon, "the infinite variety of laws and legal opinions had filled many thousand volumes, which in those days of high priced books or manuscript scrolls, no fortune could purchase, and no capacity could digest." Justinian determined to unite in one body all the laws, whatever may have been their origin. He called to his aid ten celebrated Jurisconsults, or judges, and in fourteen months accomplished his stupendous task, a task for which all future ages should accord him highest honor. Justice Story, in his address delivered, October 15, 1835, on the character and services of Chief Justice Marshall, says that, "The fame of Justinian as a fortunate possessor of the imperial purple would have long since faded into an almost evanescent point in history, if his memorable Codes of jurisprudence had not secured him an enviable immortality by the instructions they have imparted to the civilization of all succeeding times."

Have we not here a striking illustration of the fact that history repeats itself? The reports of cases adjudicated by our National and State Courts are falling from the press like a shower of meteors from a November sky. They are multiplying by the thousands so rapidly that one forbears to mention the number. But history will here also repeat itself. Some Justinian will happen along one of these auspicious days, and he is as likely to come from the recruits that the Dickinson School of Law is furnishing to our profession, as from any other similar institution in the land.

But this brief historical sketch must be condensed still further.

The eight hundred years of the "Dark Ages," when at the fall of the Roman Empire, the night of barbarism had again settled down upon the world, and all the civilization of preceding centuries seemed to have been submerged by the glacier of northern conquest that swept down upon Southern Europe,—Law, with all other achievements of mind, appeared to be buried in the gulf of oblivion. These long weary centuries seemed to sleep the sleep that knows no waking. But this was not so.

The seed sown by the noble pioneers of our profession, like the golden grain encased in the mummies of Egypt was still redolent of life, and readily burst forth in rich harvests for the future, when conditions favored its growth. Those conditions matured early in the fifteenth century. From that period forward the steady march of the law, clothed with its majesty

and power, has met no foe of sufficient strength to permanently arrest its triumphant progress. Those Northern Hordes, as they are sometimes called in history, among which were our Frankcon, German, Angles and Saxon forefathers, while rude, fierce and sometimes mercenary, yet brave and manly, had caught from the very air they breathed in their Northern forest homes, a true, though crude conception of human liberty and justice.

This, of course, took long years to formulate into the enlightened ethical Code, and rich inheritance of the common law that we, their children, now enjoy.

The trial by jury, that Paladium of Human liberty, at least in criminal prosecutions, in its slow development to its present, though not yet perfect system, strikingly illustrates this truth. While its origin is clouded by uncertainties that history has thus far been unable to solve, yet the fact of its existence attests the supreme majesty of the innate principles of justice, which animate the humane in man, and this more and more, as his conception of liberty regulated by law, broadened in the upward trend of civilization.

This boon to the human race does not owe its existence to any positive law. It is not the creation of any legislative body. Some attribute it to Alfred the Great, on the idea that it was one of the legacies bequeathed to us by our Anglo-Saxon ancestors; but others say that its origin is lost in the night of time.

Whether the English jury is of indigenous growth, or has been borrowed from some earlier age, may be a question that can not now be satisfactorily determined, yet the potent fact still remains, that, without the nurturing care and protection of the lawyers of the past, it would not now be shedding its rich benedictions on our land. There are some who, seeing an occasional failure of justice, jump to the conclusion that the jury should be altogether abolished, yet such eminent jurists as Mr. Justice Brewer, of the United States Supreme Court, while noting imperfections in our present system that should be remedied, yet vigorously upholds it in a recent able article in the *International Monthly*.

The origin of the Common Law is also wrapped in obscurity. The dim cluster of thirteen stars, representing the thirteen feeble colonies which achieved our Independence, but which has now grown into a brilliant constellation of forty-five great Republics, forming a mighty nation, "Distinct as the billows but one as the Sea," adopted the Common Law of England, so far as the wisdom of our forefathers deemed it applicable to our changed conditions, and this course has been continued with us, until we have it in the modified form we find it to-day.

This law was also then of venerable age, and enduring growth. It was a system, in the main, built upon the foundation of Feudalism, with large material imported from the Roman Codes—to which I have referred—occasionally, perhaps, modified by ancient Celtic, Saxon, Danish and Norman Laws and customs.

When in English Legislation the Common Law has been formulated into statutory provisions, as also mainly with us, the practical element has always predominated over the speculative.

"To think little of system and much of convenience; never to remove an anomaly merely because it is an anomaly; never to innovate except when some grievance is felt; never to lay down a proposition of wider extent than the peculiar case for which it is necessary to provide," these says Macaulay—"are the rules which have from the age of King John, from whom the Magna Charta was wrung, down to Victoria, generally guided the legislation of England." The same is substantially true of our State Legislatures and of our National Congress.

Equity jurisprudence, modified to meet the requirements of our State and Municipal systems, has also been mainly transplanted from the Mother soil of England.

"Equity," says a distinguished jurist, "in its comprehensive acceptation, includes the whole circle of moral and civil obligation, and is the end to the attainment to which all laws should be directed." Equity owes its origin to the immutable principles contained in the Moral Law. It is not, however, a superior power rising in awing grandeur above the Common Law, or above State or Municipal regulations, without impediment or restraint, but merely a subservient principle not called

into action, until by reason of its universality, its superior is deficient. When, therefore, the subject of a complaint is the necessary and immediate result of a law founded upon general principles, equity can not arrest its progress; but when the injury is collateral, so that it may fairly be presumed to have been unforeseen by the legislator, this beneficent power may interfere for the advancement of justice."

As the application of the principles of equity by the Courts of Pennsylvania is peculiar to this State, I shall ask your attention a little further on this point. That there never has been a Court of Chancery, answering or corresponding with the Court of Chancery of England, in Pennsylvania; and that there never will be is shown by the strong, popular feeling against such a Court from the earliest period of our Colonial existence. The year 1790 is the true point at which we must fix the establishment of Pennsylvania's jurisprudence; but all efforts, both prior and subsequent to that date, have failed to establish a separate and distinct system of Chancery or Equity jurisprudence.

Pennsylvania has, therefore, a mixed system of the Common Law and Equity, administered by the *same* tribunal. In this regard our judiciary stands in the forefront of opportunity to dispense as equal and exact justice as can be done through human agencies. Experience has fully proven that equity and law can now be concurrently administered by the same judges; and that when a system of jurisprudence is founded upon rational principles, and free from useless niceties, there is little more required to complete equity, than a fair and correct interpretation of the law itself. "There can be no possible disadvantage in these modern times," says Anthony Laussatt, Jr., in an able lecture delivered in 1825, "in expounding the law by the rules of reason and natural justice, and this is attained by the union of the two powers in one tribunal."

That we do not find in Pennsylvania two distinct systems of jurisprudence, known respectively as law and equity, determined by *different* tribunals and administered by *different* judges, is doubtlessly largely accounted for by the views of our early settlers as to the object and purposes of the law. In the laws agreed upon in England, May 5, 1682, before William Penn set sail for America, it was provided, "That in all Courts, all persons of all persuasions, may freely appear in their own way and according to their own manner, and there personally plead their own case themselves, or, if unable, by their friends; and that all pleadings, processes and records in the Courts shall be short, and in English, and in an ordinary and plain character, that they may be understood and justice be speedily administered."

Truly here every man might be his own lawyer and, doubtlessly, also to his own discomfiture. Yet from this unwinnowed, but pure seed of the Golden Rule has sprung the rugged, majestic trunk, and wide-spreading and fruitful branches of the royal oak that now stands as the jurisprudence of the Keystone State. While claiming no pre-eminence in this regard, Pennsylvania feels that she shares equal honors with her sister States, as one of the "*E Pluribus Unum*," whose canopy is luminous with as pure a judicial lustre, and as brilliant stars among its lawyers, as has ever shed its light upon the world.

While I might here interpose as a plea of "Confession and avoidance," the fact that this is a Historical Society, to the complaint that history has already received more than its share of the time allotted to me, yet I will endeavor to merit equity by doing equity, and confine my remaining remarks to "The young lawyer of to-day."

A brief comparison of our profession and our Courts of forty years ago with those of to-day may not be devoid of interest and instruction. C. Larue Munson, of Lycoming county, one of the distinguished lawyers of our State, in a lecture delivered before the York Bar Association, on John Marshall Day, February 4, 1901, thus graphically states this comparison. "Let us consider for a moment how differently we do our work now, than we did in the seventies. Then, for example, our correspondence was done wholly with the pen. Now we call our stenographer or expert typewriter to our elbow and he—more frequently she, for the average lawyer is a man of good taste—relieves us of the physical labor of committing our correspondence to paper, requiring us only to append

our names, often translatable only by the business card at the head of the sheet. Formerly we wrote out all our legal documents, a most laborous task, now we accomplish the work by dictation, and are able to deliver our clients legible copies of their agreements, with as many duplicates, by carbon, as may be desired.

Compare us also with the old lawyers who prepared their pleadings under the eye of Chitty, now lying dust covered and forgotten on our top-most shelves, while we make a statement, "As a tale that is told," without fear of defeat for want of phrase or technical terms.

No longer do we declare in assumpsit upon the common count—most meaningless language; no more do we declare in trover and conversion that our unfortunate and careless client casually (mark the word) lost, the defendant alike by mere chance found, and then led on by the demon, forgetful of Commandments eight and nine, wickedly converted to his use our client's twelve swine, sheep, horses, cows, calves or other cattle, on any old date, but also, always, to wit:—at the County aforesaid. No more do we need to observe the fine distinction between trespass, and trespass on the case, no longer are we obliged to brush up our Latin against *quare clausam fregit*, trespass *de bonis asportatis, and trespass vi et armis.* All we need to do is to decide whether it is for debt or injury that we seek to recover, and so we write assumpsit or trespass in our praecipe and get at the substance of our case, assured that it will be tried on its merits, and not on our abilities as special pleaders.

In the means of access of the lawyer to his client and his affairs, how vast a change. The present rapid mail service, the telegraph, and the telephone have reduced the time required for transactions from weeks formerly, now often to the fraction of a day or even an hour. This enables one to transact more business with less worrying delay, and affords him larger opportunities for preparation to do it well.

Passing into the Court room, we find improvements there, although not so marked as in our offices. How much the stenographer has also improved the manner of the trial of causes, only a comparison with other days will show. The date we will say is 1870, Jones vs. Smith is on trial. The cause has been duly opened and a witness called to the stand, the only record we can have of his evidence, indeed of all the oral testimony, being that furnished by the Judge's notes—a task as irksome to the bench as its results must have been unsatisfactory to the Bar. A witness is asked a question, objectional to the other side. "Make your offer," is the demand. Now-a-days it is a mere matter of dictation, both in the offer and in the objection; then the attorneys for Jones must put their heads together and evolve a long offer, committing it to the so-called writing—imagine the time required in the operation—and, when finished, pass it over to the counsel for Smith, who prepare their objections, also in writing, consuming no little time, until at last the thing looking to the unpracticed eye almost as illegible as hieroglyphics of Egypt, is literally "up to" the court where it receives adjudication, in formal style, and thereupon a bill is *actually* sealed. How rare a bird is that old "bill sealed" in these modern days of tongue and stenographer? The fiction remains but the fact is gone."

How different is all this now, and is it an unwarranted stretch of the imagination to assume that as striking a contrast may exist between the present conditions and those of as many years hence?

The young lawyer of to-day must equip himself to meet these sweeping advancements, but this should not discourage him. By diligent effort in appropriating the superior advantages presented to him he will not prove himself an unworthy son of a worthy sire. There is no calling in which the truth that every man is the architect of his own fortune, is more strikingly exemplified than in the profession of the law. This profession now covers the whole rapidly broadening field of human activities, and exacts a studied familiarity with all its varied requirements. If, therefore, the young lawyer would attain a full measure of success he must strive to reach the front rank of mental athletes. If, however, he depends upon brilliancy alone, he will in the end, find himself outstripped by perhaps less talent, but more severe application, careful preparation and practical common sense. Work

now as it always has been, is the talisman of success; and as George F. Baer, President of the Philadelphia and Reading Railroad Company, in his recent admirable lecture before Franklin and Marshall College, declares, is—Worship. This is true, at least in the sense, that he who worships work will be rewarded. Hume says, "Everything in this world has been purchased by labor."

Law is, without question, one of the most sternly exacting professions of our day, and the young lawyer who was "born tired" will soon discover that he has mistaken his calling. These may seem harsh facts, but frank statements are always the best, and I believe when you, gentlemen, chose your honorable profession, you did it with no thought that you would be "carried to the skies on flowery beds of ease, but that you must fight to win the prize." You, who with courage and resolution adopt this motto, will win as surely as did those of our profession who have preceded you. The changed conditions which we have noted admonish us that it may not be on the same lines, but it will, nevertheless, be a success worthy of your best efforts.

The former enviable position of the lawyer as a brilliant advocate has changed in this severely realistic age to that of the counsellor and adviser. How would the ornamental rhetoric and grand flights of eloquence of even a Curran, an Erskine, or a Burke, or here with us, of a Henry, a Wirt, or a Prentiss, sound in our district, much less our Appellate Courts, State and National?

Even our jurors prefer the cold facts clearly stated, to a bewildering muddle, however richly perfumed with the aroma of eloquence.

To this austère and practical age every interest, business and profession, must bow. This is not stated to discourage the young lawyer, but to inspire him in his efforts to acquire the highest attainments in all that enriches his native tongue and gives clearness and brevity to his statements. His carefully prepared brief which will enable the Judge to follow his argument without having his attention distracted by taking notes of a mixed and obscure statement, will do much to get his case clearly and forcibly before the court.

The day of quirks and quibbles before our courts, and the pettifoggery play with our juries, is rapidly passing away. It is the law, clearly, logically and succinctly stated, without appeal to passion or prejudice, that our courts want; and the lawyer who attempts to play upon the credulity of our average juries by discounting their intelligence, will generally find, if possessed with an ordinary degree of perception, that he has missed his mark. But, above all, the success of the young lawyer of to-day must depend mainly on the confidence imposed in his ability and integrity by his clientage. The glamour of legal acrobats counts for very little now.

Every man, whatever be his calling, is more clearly and accurately measured for what he is worth now than ever before.

Sham pretentions and flattering professions win little, and will win less in the near future. The wrecks that already strew the bars of our profession attest this truth. This potent fact has so aroused the attention of our profession, that it is taking a firm grasp upon it.

The marvelous increase of the organization of State and district lawyers' associations during the last ten years evidence the earnest purpose of the profession in its work for ethical and law reform. To-day forty-one of our forty-five States have bar associations, and there are more than two hundred and fifty local or county associations. Some of these last may not yet fully comprehend the real purpose of these organizations, but they will early learn that their sole object is to dignify and exalt our profession, and thereby secure the confidence of the public, and is not to conceal or palliate the offenses of discredited members of it. That this sentiment is also taking strong hold, not only in these associations, but in the profession generally, is demonstrated by the adoption of higher standards for admission, and especially, by the numerous disbarments of unworthy members of the profession that have recently occurred in our own and other States of the Union.

The following preamble adopted by the Pennsylvania Bar Association, and with slight change of phraseology, by the National and all the other State Associations, indicates their high purpose. "Section 1. This Association is formed to advance

the science of jurisprudence; to promote the administration of justice; to secure proper legislation; to encourage a thorough legal education; to uphold the honor and dignity of the bar; to cultivate cordial intercourse among the Lawyers of Pennsylvania; and to perpetuate the history of the profession and the memory of its members. Section 2. It shall not take any partisan, political action, nor endorse or recommend any person for any official position."

It will be noted that there is nothing here that savors of the spirit of sordid, self-interest or commercialism; and the honorable record these Associations have already made, shows that their announced purposes are not mere professions, but determined resolve to accomplish as far as honest, persistent effort can, the work to which they have pledged themselves. All these purposes as set forth in the above preamble, are assigned to committees composed of eminent members of the profession, who, with rare earnestness, give their best thought and most unstinted labors. The amount of work thus done by these committees in the Pennsylvania Bar Association, during its short history of seven years, is most surprising —and all freely and faithfully done to advance the science of jurisprudence, promote the administration of justice, and uphold the honor and dignity of the bar, by exalting the Ethics of the profession. Of the first of these, Edmund Burke declared that: "The science of jurisprudence is the pride of human intellect, which, with all its defects, is the collected reason of the ages, combining the principles of original justice with the infinite variety of human concerns. That it is one of the first and noblest of human sciences, a science which does more to quicken and invigorate the human understanding than all other kinds of human learning."

Daniel Webster says of the second: "Justice, sir, is the greatest interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of the race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundation, strengthens its pillars, and adorns its entablitures, or contributes to raise its august dome still higher in the skies, connects himself in name and fame and character, with that which is, and must be, as durable as the frame of human society."

Of the third, Justice Sharswood bears this testimony, that "there is no profession in which moral character is so fixed as in the law; there is none in which it is subject to severer scrutiny by the public." It is well that it is so. The things we hold dearest on earth—our fortunes, reputations, domestic peace, liberty, life—we confide to the integrity of our legal counsellors and advocates. Their character, then, should not only be without stain, but without suspicion. From the start, then, cultivate truth, simplicity and candor; they are the cardinal virtues of the lawyer.

I have purposely quoted these three, among the noblest masters of our professions, as thus giving to us the beatitudes of the "Science of Law." Never in the past history of the law, nor in any other nation, have these truths, and especially the last named—so eloquently stated by Justice Sharswood—assumed so insistent and commanding an influence as with us to-day. Vigilant, alert, and instant in action, our people jump to seize and utilize, not only every new discovery or invention, but also, with keenest discrimination, to measure and reward moral worth and professional reliability according to their merits. This fact has assumed a commanding potency, even aside from its moral support, simply because the enlightened selfishness of our people has wisely decided that it pays to follow its teachings, and that merit should win because it deserves to win.

The nations of Europe, astounded at the marvelous material, scientific and economic development of our young nation, are learning from those whom they have sent here to discover the cause, that it is simply the recognition of the manliness of man—thoroughly equipped to discharge the duties assigned him, faithfully and efficiently—that has placed us in the front rank of the world powers to-day.

With such an equipment the young law-

yer, notwithstanding the pessimist's gloomy lament that he was born a generation too late—with no other capital than a trustworthy character, a well-trained mind, broad intelligence and industrious habits—a capacity for hard work, and an ambition to get on in the world—starts in the practice of his profession with as encouraging prospects of success as has ever greeted the fathers of the past.

MOOT COURT.

SHANNON'S ESTATE.

Wills—Trustee and cestui que trust—Embarrassment of trustee—Right of one beneficiary to the benefit of additional security induced by other beneficidry before default of trustee.

STATEMENT OF THE CASE.

John Shannon by will, gave his personalty, $25,000, to Jacob Tritt, in trust to invest it, and pay the net dividends and interest semi-annually, one-half to his daughter, Jane Shannon, and one-half to his son, James. At the death of either, one-half of the principal was to be paid to his or her children, or his or her legatees, or, in default of children and will, to be left invested and the dividends and interest paid to the survivor during life, and at his or her death, to his or her children, or legatees, or, in default of either, next of kin. Two years after testator's death, James thought it prudent to take security from Tritt, and received from him a mortgage for $15,000, conditioned to be void if Tritt should faithfully preserve one-half of the fund in his possession, pay the interest, etc., to James during life, and at his death, the principal to his children or legatees. He gave to Tritt, as an inducement to give the mortgage, $250. Tritt remained in good credit for 10 years, faithfully administering the property. He then became embarrassed and used the whole of the trust fund in his business, and ultimately lost all. This was 13 years after the giving of the mortgage. James Shannon then sued out the mortgage and his sister, Jane, who had learned of it five years before, filed a bill to compel James to assign to her one-half of the mortgage, on her tendering $125 with interest from the time of the payment to Tritt of $250. The decree was entered.

THORNE and DEVER for the plaintiff.
ELMES and KEELOR for the defendant.

Community of interest produces community of duty; each of those interested must be faithful to himself and equally as well to all the others interested. He can secure no advantage because he has found something they do not know, or is in better position to protect himself. Advantages gained by one must inure to benefit of all. Estate Susan E. Duplaine, 185 Pa. 332; Weaver v. Wible, 25 Pa. 270; Lloyd v. Lynch, 28 Pa. 419; Gibson v. Winslow, 46 Pa. 380; Kennedy v. Borie, 166 Pa. 361; Powell v. Lantzey, 173 Pa. 543; Aubert's Appeal, 119 Pa. 52; Wilen's Appeal, 105 Pa. 121.

OPINION OF THE COURT.

It is believed that the decree of the court below should be affirmed. The case is similar to that of the Estate of Susan E. Duplaine, 185 Pa. 332, where the court said: "It has been settled that where there is a community of interest there is a community of duty, each of those interested must be faithful to himself and equally as well to all the others interested." It is true that the equities in this case are not so overwhelmingly in favor of the complainant as in Duplaine's Estate. There, the trustee was embarrassed when the mortgage was secured from him; here he was not. There, the brother for several years concealed from his sister all knowledge of the mortgage he had secured, and of the embarrassed condition of the trustee; here, the sister learned of the mortgage two years before the trustee became embarrassed and five years before he lost the trust funds. There, no money consideration appears to have been paid for the mortgage; here, the brother paid $250. Notwithstanding these differences, however, we feel that in the case before us, the brother's conduct was clearly inequitable. By taking the mortgage from the trustee, he obtained a security which his sister did not possess. She might also have requested a mortgage, but there is no evidence that the trustee would have granted her request. Moreover, it does not appear that he was the owner of property other than that mortgaged to the brother, so that a mortgage to the sister would probably have been a second lien,

and perhaps of no value whatever. In short, the brother deliberately placed himself in a position distinctly superior to that of his co-beneficiary. Under the authority of Duplaine's Estate, *supra;* Weaver v. Wible, 25 Pa. 270; Lloyd v. Lynch, 28 Pa. 419; Gibson v. Winslow, 46 Pa. 380; Kennedy v. Borie, 166 Pa. 360, and Powell v. Lantzey, 173 Pa. 543, this cannot be tolerated. It is repugnant to the sense of justice and a violation of the duty of joint beneficiaries to deal fairly and openly with each other.

The complainant is not chargeable with laches, as the rights of no one were prejudiced by the delay.

Decree affirmed, with costs.

NAPLES vs. NAPLES.

Taxes—Unseated lands—A lien on land—Not a personal liability—Life tenant—Remaindermen.

STATEMENT OF THE CASE.

In the partition of John Naples' estate, unimproved and unseated land was allotted to Sarah Naples for life as dower. She received for life also, the mansion house in town, the rental of which was $120 annually. Her step-son paid the taxes accrued on the unseated land for four years, in order to avoid a sale. He brings this suit for reimbursement.

BROOKS and MCKEEHAN for plaintiff.

A life tenant is bound to pay taxes in exoneration of those entitled in remainder. Estate of Schurr, 13 Phila. 353; McDonald v. Heylin, 4 Phila. 73; Jewell's Estate, 1 W. N. C. 405; Foger v. Campbell, 5 Watts 288.

MOON and OSBORNE for defendant.

Unseated lands are alone liable for taxes assessed thereon; there is no personal liability upon the owner thereof. Hunter v. Cochran, 3 Pa. 107; Kennedy v. Daily, 6 Watts 272; Neill v. Lacy, 110 Pa. 294.

OPINION OF THE COURT.

This is an action of assumpsit by John Naples against his step-mother, Sarah Naples, to recover the amount of certain taxes paid by him on unimproved and unseated lands allotted to her for life, as dower. The taxes were paid by him in order to prevent a sale of the property.

It cannot be denied that under all just systems of taxation, he who presently enjoys the subject of the tax, ought to discharge the present obligation. In recognition of this principle, Justice Bell in Spangler v. York Co., 13 Pa. 327, held that, "all our tax laws, without exception, recognize the personal amenability of the immediate beneficiary."

The tenant for life being in possession and enjoyment of the property, it would follow from the rule as laid down in the cases, that he or she is bound to pay the taxes in exoneration of the remainderman and that estate should be first called upon and exhausted. Estate of Schurr, 13 Phila. 353; McDonald v. Heylin, 4 Phila. 73.

John Naples must have had some interest in the land held by his step-mother for life, which should be protected, for we can see no reason for his payment of the taxes to save the property from sale. This interest, as we can gather it from the statement of facts, is a remainder. Men generally are adverse to paying the debts of others.

It is a clearly established principle that no assumpsit will be raised by the mere voluntary payment of the debt of another person; from such act a request and promise are not implied. It is equally true that when the plaintiff is compelled to pay the defendant's debt in consequence of this omission so to do, the law infers that he requested the plaintiff to make payment for him. King v. Mt. Vernon Building Association, 106 Pa. 165; Hogg v. Longstreth, 97 Pa. 255; Bank v. Shoemaker, 13 W. N. C. 255.

From the facts in the case Sarah Naples, the life tenant, is primarily liable for the taxes assessed on the land allotted to her, unless the additional fact, that the lands thus held were "unimproved and unseated" changed this liability.

A distinction has been drawn in this state with reference to seated and unseated lands so far as the liability of the owner for taxes is concerned. The well recognized rule in Pennsylvania is that taxes on seated lands are a charge upon the land merely. Stokely v. Boner, 10 S. & R. 256; Kennedy v. Daly, 6 Watts 273; Hunter v. Cochran, 3 Pa. 107.

The Act of Assembly of April 3, 1804, provides: "All unseated lands within this Commonwealth * * * * * * * shall for the purpose of raising county rates and

levies be valued and assessed in the same manner as other property." The act also provides for the sale of unseated lands in default of taxes, which sale shall vest in the purchaser a fee simple.

The land itself and not the owner being debtor for the taxes, it is immaterial what may be the state of the ownership or how many derivative interests may have been carved out of it. With these the public has no concern; they are sold with the land just as a remainder would be sold with the particular estate. Foger v. Campbell, 5 Watts 288; Stranch v. Shoemaker, 1 S. & R. 175.

Although a sale of this land for the non-payment of the taxes would doubtless divest the plaintiff of his interest therein as remainderman, yet to allow him to pay the taxes and recover in this action the amount of money thus expended would be compelling the life tenant to pay indirectly what she has neglected or absolutely refused to pay, and for which, according to the decisions, she is not liable personally—the remedy being in all cases the sale of the unseated lands by the authorities.

If we allow a recovery for the remainderman, compelling her to pay the taxes during the whole of the life tenancy, if she continues to hold the land, refuses to pay the necessary charges and he institutes no proceedings to dispossess her, but decides to pay the charges and resort to his assumpsit to recover such expenditures. This we think would be not only inequitable, but contrary to the decisions relative to the liability of the owner for taxes on unseated lands.

The principle that when one is compelled to pay another's debt in consequence of his failure so to do, the law will infer that he requested such payment, is not applicable to this case. This is no personal debt, but on the contrary is a charge upon the land for the satisfaction of which the statute authorizes a sale. The presumption that she requested the payment of a debt for which she was not primarily liable is unwarranted or supported by the facts.

Judgment is therefore entered for the defendant.

DAVIS, J.

OPINION OF THE SUPREME COURT.

By the proceedings in partition Mrs. Naples, as dowress, became life tenant of the land. Unseated land may be taxed, and the tax becomes a lien upon it. Indeed it alone, can be resorted to, for the purpose of compelling payment. The owner is not compellable by attachment or imprisonment, or by levy and sale of any other property, real or personal, which he may have. The owner of unseated land therefore, can choose either to pay the taxes and retain the land, or to forego the land and avoid paying the taxes.

Mrs. Naples, if owner in fee, could unquestionably have done this. She is only a life tenant however, and her step-son, son of her husband by a former marriage, is the reversioner. What we have to consider is did the fact that she had only a partial estate in the land, the step-son having the residue, impose on her towards him the duty of paying the tax?

When tax is assessed on unseated land, it is assessed not on partial interests, but on all interests which, combined, make a fee simple in possession, or, as it is said, it is assessed on the land; and when a sale for non-payment of the tax takes place, it is a sale of the land, *i. e.* of the fee simple in it; of all the partial interests into which that fee may happen to have been broken. From this it results that if the reversioner wants to save his estate, he must pay the taxes, though they are assessed during the life estate, if the life tenant omits to pay them.

In the case of seated land, the life tenant is under a personal duty to the state to pay the taxes, and there may be a lien on the land besides. This duty exists, not simply towards the state, but also towards the reversioner or remainderman. If it is neglected, the latter on paying the tax is entitled to reimbursement from the life tenant by *assumpsit*. II P. & L. Dig. 18701; *Cf.* Spangler v. York Co., 13 Pa. 322; Deraismes v. Deraismes, 72 N. Y. 154; 25 Am. & Eng. Encyc. 281; King v. Mt. Vernon Building Association, 106 Pa. 165.

When there is a personal liability to pay the tax, the reversioner who pays it may claim reimbursement from the life tenant by a species of subrogation. Or, as some of the cases postulate, the life ten-

ant owes a duty to the reversioner because of the transfer to him of a burden which the former ought to have borne.

There are two reasons, however, why, in our opinion, the defendant cannot be made to reimburse the plaintiff. She is life tenant as dowress. The land is unseated. It is not resided on, nor cultivated. There is no evidence that there are opened mines on it, which she has a right to operate, nor that there is timber on it, which she has a right to take off and sell. It does not appear that she has derived or could have derived any profit from it. Following the authority of Clark v. Middlesworth, 82 Ind. 240, we think a life tenant under such circumstances, not bound to pay the taxes, or to reimburse the reversioner who does pay them. He has a right to let the state take his land if in his opinion it will pay him better to lose it, than to retain it and pay the taxes assessed annually upon it. The burden of showing that the land did yield or would yield enough to pay the taxes, is on the plaintiff. *Cf.* Billings v. Billings, 135 Pa. 199.

We think again, that Mrs. Naples should not be compelled to pay the taxes to John Naples, because the state did not oblige her to pay them, but gave her the option to pay them or suffer a sale, and we see no reason for depriving her of the option because, for his own advantage, John Naples has chosen to pay them. She has chosen to sacrifice her life estate; he has chosen to preserve his reversion. The mere fact that in doing so, he has also preserved her life estate should not give him a right of indemnification from her, at least until by continuing to exercise acts of ownership over the land, she, in a way, attempts to take advantage of his act. Perhaps, should he take possession of the land, and she attempt to dispossess him, or should she otherwise claim the land, she would give him a right of action, because she had, perhaps, availed herself of the fruit of his payment. In the absence of such appropriation to herself of its fruits, we think she cannot be compelled to repay him.

An effectual means to protect himself would have been for John Naples to suffer a sale of the land, and to buy it himself, or allow another to buy it, and then redeem it within the two years. Before Sarah Naples could have reclaimed her life estate, she would have been obliged to repay his outlays. In such a case, she would have sought an advantage from his act, and it would be fair to hold her unable to obtain it except on the condition of reimbursing him. *Cf.* Billings v. Billings, 135 Pa. 199.

Judgment affirmed.

HULL vs. FARRELL.

Bonds—Mortgages—Right to proceed on bond when value of mortgage lessened.

STATEMENT OF THE CASE.

Hull loaned $1,000 to Samuel Farrell, son of Thomas, taking a mortgage on his house. Three months later, discontented with his security, he applied to the defendant for more. Farrell then executed a bond for $1,000. The mortgage and bond were both payable one year from date. Hull took no steps to collect them for five years, and meantime a fire destroyed the building so that the lot was worth only $150. Offering to assign the bond and mortgage to Thomas Farrell upon his paying his bond, Hull failed to obtain payment and brings this assumpsit.

WHITE and CISNEY for the plaintiff.

The relation of Thos. Farrell was that of surety, rather than guarantor. 49 Pa. 259. Every bond imports a consideration. 11 S. R. 107; 2 S. & R. 202; 171 Pa. 632. Delay did not preclude Hull's bringing suit. 8 S. & R. 110; 11 Sup. 413.

CARLIN and J. H. JACOBS for the defendant.

The bond was neither a guaranty nor a suretyship. Vale Elementary Law of Pa. 725-739. Hull was guilty of laches in not seeking payment. Reigert v. White, 52 Pa. 438; Gilbert v. Henck, 30 Pa. 205.

OPINION OF THE COURT.

The decision of this case depends upon whether or not Thomas Farrell, the defendant, was a guarantor or surety.

Hull loaned Samuel Farrell $1,000 for which he received a mortgage on Farrell's house as security. Subsequently Hull became dissatisfied with the security and applied to defendant for more, whereupon Farrell executed a bond of $1,000.

What are the distinguishing features of a guarantor and surety? A guaranty is a

collateral undertaking in writing to pay the debt of another in case such other does not pay it. 1 W. & S. 203. A surety is an original undertaking in which the surety is bound to the full extent of the principal's liability. A guarantor insures the debt. A surety insures the solvency of the debtor. 124 Pa. 58; 52 Pa. 525.

Let us compare the above statements and thus arrive at the conclusions as to whether Thomas Farrell was a guarantor or surety. The bond in this case was collateral, because in "Bouvier" collateral security is defined as "a separate obligation attached to another contract to guarantee its performance." A surety is bound to the full extent of his principal's business, He also insures the solvency of the debtor. In the case at bar this was not done. The defendant simply insured this one debt of his son, not his solvency. Hence we think that Thomas Farrell was a guarantor.

What are Farrell's rights as such? In the first place due diligence must be exercised by the creditor to collect the debt from the principal. 52 Pa. 525; 2 W. 128; 31 Pa. 110; 30 Pa. 205; 5 Pa. 178. This was not done by Hull but instead he allowed five years to elapse before he brought this action. Secondly, the guarantor becomes liable on the guaranty as soon as it is judicially settled that the debt cannot be collected. 100 Pa. 100; 27 Pa. 317; 30 Pa. 205; 25 Pa. 210. In this case it has not been judicially settled that the debt cannot be collected. Thirdly, the plaintiff must have exhausted his remedy upon the mortgage before he can sue upon the guaranty. No action has been brought upon the mortgage. Hence we think that Samuel Farrell should pay instead of Thomas. Judgment is therefore rendered for the defendant.

MOON, J.

OPINION OF THE SUPREME COURT.

Hull had loaned $1,000 to S. Farrell, taking from him a bond and mortgage on a house as security, which were payable one year after date. Thomas Farrell, three months afterwards, executed to Hull a bond for $1,000. This bond was absolute, making no reference to the debt of S. Farrell. It was nevertheless intended by its maker and by the obligee, to secure the payment of the S. Farrell bond.

There does not seem to have been a consideration for this bond. No new credit was given by Hull. He agreed to no prorogation of the payment. The seal however, dispenses with a consideration. Union B. & L. Ass'n v. Hull, 135 Pa. 565; Hosler v. Hursh, 151 Pa. 415.

The bond, we have said, makes no reference to the S. Farrell bond. It is not a guaranty. It is not to be paid, if S. Farrell should not pay, and if prompt resort being had to him, he should be insolvent. Thomas Farrell declares himself unconditionally bound to pay $1,000 on the day mentioned. Had it even been payable, if the S. Farrell bond should not be paid, it would not be a guaranty, but a suretyship. Campbell v. Sherman, 151 Pa. 70; McBeth v. Newlin, 15 W. N. 129.

It was not necessary for Hull to proceed against S. Farrell within a reasonable time, and the lapse of five years without action, during which a fire has materially lessened the value of the mortgage, has not impaired Hull's right to enforce the payment of $1,000 from the defendant. Campbell v. Sherman, 151 Pa. 70; Searight's Estate, 163 Pa. 210; Commonwealth v. Degitz, 167 Pa. 400; Winton v. Little, 94 Pa. 64; Kind's Appeal, 102 Pa. 441; McCarty v. Gordon, 4 Wh. 321.

It is to be regretted that the case has been considered by the learned court below with so little desire to understand it, and so little effort to investigate the principles necessary for its solution.

Judgment reversed.

GOWAN vs. STANDARD WOOD CO.

Act of 1895—Survival of actions.

STATEMENT OF THE CASE.

One Thomas McGowan was employed by the Standard Wood Co., of this place. The employees went on a strike and the manager of the Wood Company, having reason to believe that McGowan was at the head of a crowd whose intention was to burn the factory, caused his arrest for attempted arson. The fellow waived a hearing and went to jail. At the term of court, not having sufficient evidence to convict and the strike being over, the company acquiesced in a *nolpros.*, paid the costs and the defendant discharged. The

defendant then brings suit for $10,000 damages for false arrest and malicious prosecution against F. H. Lepsch, manager of the Wood Company.

During the pending of the suit McGowan, plaintiff, died. The defendant company filed a plea in abatement suggesting death of plaintiff. Counsel for plaintiff asks that personal representatives of deceased be substituted as plaintiffs and proceed to final judgment. It was placed on the argument list and argued.

MILLER and LONGBOTTOM for the plaintiff.

The right of action survives to the personal representatives. Act of June 24, 1895.

If in the performance and within the apparent scope of his duties, the agent of any corporation inflicts unwarranted injury upon another the principal is liable. Vol. 7, Am. & Eng. Ency. of Law, 684 and cases there cited.

WATSON for the defendant.

Act of 1895 does not apply, since the injury was not caused by negligence or default.

Injury must be caused by negligence or wrongful violence. 33 Pa. 318; 40 Pa. 97; 44 Pa. 175; 23 Pa. 526.

OPINION OF THE COURT.

It was a principle of the common law that if an injury was done to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person. *Actio personalis moritur cum persona.* This rule, that the action died with the person, to whom or for whom the wrong was done, was calculated to do an injustice, and we find the same gradually relaxed. For where goods remained in specie, it was decided that replevin or detinue would lie for or against the executor, to recover back the specific goods, Sir William Jones 173, 174. If goods were consumed it was ruled that an action would lie to recover their value. In these decisions the principle is recognized that there was not only an injury to the plaintiff, but a benefit to the defendant.

The principle, however, was still recognized that if the action be for a *wrong done to the person*, it died with the person. Hence at the common law this action for "false arrest" and "malicious prosecution" being a wrong done to the person, though grievous in its nature, would not have survived.

It is evident then that if this action survives, it survives by virtue of an Act of Assembly. And we are therefore obliged to consider the construction placed upon the statutes in regards to the survival of actions.

By the 28th section of the Act of February 24, 1834, relating to decedent's estates, power is given to personal representatives to prosecute all actions which the decedent, whom they represent, might have prosecuted, "except actions for slander, for libels and for wrongs done to the person" and by the last clause of this section, "they shall be liable to be sued in any action, *except as aforesaid*, which might have been maintained against such decedent, if he had lived." At common law this cause of action would have died with the defendant and since it is a *wrong done to the person*, it dies notwithstanding the Act of 1834 Supra. Grim v. Carr's Administrators, 31 Pa. 533.

The Act of April 15, 1851, P. L. 669 § 19, provides that "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or if there be no widow, the personal representatives may maintain an action and recover damages for the death thus occasioned," and the 18th section of the same act provides that when an action is begun by the party injured, by the negligence of the defendant, the same shall not abate by reason of the plaintiff's death; "but the personal representatives of the decedent may be substituted as plaintiff, and prosecute the suit to final judgment." The Act of April 26, 1855, P. L. 309, section 1, merely designated the persons entitled to recover under the Act of 1851. Thus it will be seen that the Act of 1834 Supra, was changed by the Act of 1851, so far as to allow the widow and personal representatives of a decedent to sue for injuries to the person, resulting in death, from unlawful violence or negligence, but it goes no further. The right, therefore, to bring an action in case of wrongs done to the person, arises by virtue of the Act of Assembly; the right did not exist at common law; hence no rights arise except those expressly given by statute. The only exception, as to *wrongs done to the*

person, being death caused by *unlawful negligence or violence*, we cannot see our way clear to extend it to mean *any* wrong done to the person, *not* caused by negligence or violence, and *not* resulting in death.

Under the Act of 1851 and 1855 Supra, the *cause* of the action for wrongs done to the person by unlawful negligence or violence survived, but not the liability. Therefore under those acts no action could be maintained against the personal representative of the wrong-doer. Rosanna F. Moe v. T. J. Smiley, 125 Pa. 136. The liability of the action abated with the death of the wrong-doer. The Act of June 24, 1895, P. L. 236, section 1, provides that the liability of the action shall survive the death of the wrong-doer. In the case at bar, we are dealing with the *cause* of the action, and therefore the Act of 1895 does not apply as contended by the plaintiff.

We are therefore of the opinion, since this action did not survive under the principles of the common law, and since it does not fall within the exceptions provided by statute, that the action abated with the death of the plaintiff.

Judgment for defendant.

SHERBINE, J.

OPINION OF THE SUPREME COURT.

The Act of 1834 provided for the survival of causes of action after the death of the person who suffered or inflicted a wrong, except when the wrong was libel, slander, or a wrong to the person. The wrong done to a husband by criminal conversation with his wife, has been held to be a wrong done to the person; the action for which abates with the death of the paramour. Clarke v. McClelland, 9 Pa. 128, and in Grim v. Carr's Admin., 31 Pa. 533, a man's deceiving a woman into marrying him, by representations that, though in fact married, he was single, was said to be a wrong to her person. "It involved," said Woodward, J., "the prostitution of her body, and the labor of her hands, not to speak of the shame and grief it cost her. These were all wrongs done to her person and such causes of action are not saved by the statute." The court below correctly decided that the wrong of a false arrest and malicious prosecution is a wrong to the person of the arrested or prosecuted one.

It is not suggested that any legislation, later than the Act of 1834, has preserved the right of action, after McGowan's death, unless it be the Act of June 24, 1895, P. L. 236. The Act of April 15, 1851, 1 P. & L. 1500, which refers to actions for damages for injuries to the person, is limited to actions for such injuries as arise from negligence or default. We do not think the damage caused by an arrest and a prosecution which are purposed, can be described as arising by negligence or default, although it was a mistake or inadvertence, possibly involving negligence, that inspired the arrest and prosecution.

The Act of 1895 provides for the survival of a right of action for an injury "wrongfully done to the person of another," but only for such survival after the death of the wrong-doer. It makes no provision for survival after the death of the sufferer of the injury. It is McGowan, not Lepsch, who has died. The Act of 1895 has left the law, therefore, in this peculiar state. The liability of the inflicter of a wrong to the person not negligent, or by default, or not resulting in death, does not perish with his death, but it does perish with the death of his victim. It is not likely that, had the legislature been aware that they were making the effect of the death of the agent different from that of the death of the patient, they would have done so. They nevertheless have done so, and it is not for us to rectify the result of their *lapsus*.

Judgment affirmed.

HENRY vs. O'LEARY.

Slander— Words actionable per se —Damages for mental suffering.

STATEMENT OF THE CASE.

O'Leary had lent $25 to Henry, and several weeks after it ought to have been returned, asked him for it. Henry superciliously declined to pay, whereupon, O'Leary, in the presence of two persons, told him, as Henry alleged, that he was a thief for acting so. "No man would refuse to pay a sum of money borrowed if he was not a thief." This is an action of slander. Henry asked the court to say that though the by-standers did not believe that O'Leary was intending to

charge him with having stolen anything, yet, if O'Leary intended that they should so believe, he was guilty of slander.

He also asked an instruction that he was entitled to compensation not merely for injury to his reputation, but for the wound to his own feelings sustained by the malice of O'Leary in uttering the words.

The court refused both requests.

PHILLIPS and WINGERT for the plaintiff.

"You are a thief; no one but a thief would refuse to pay a sum of money borrowed" are words actionable *per se*. Kerr v. Atticks, 22 Pa. C. C. R. 233; Todd v. Rough, 10 S. & R. 18.

Where the charge implies moral turpitude, the element, danger of punishment, is not necessary. Smith v. Stewart, 5 Pa. 372.

Where words tend to take away a man's good reputation, they are actionable. Eckert v. Wilson, 10 S. & R. 44.

WATSON and WILLIS for the defendant.

Since the words do not charge the plaintiff with having an infectious disease, or charge an offence involving moral turpitude or tend to injure plaintiff in his office, profession, or trade, they are not actionable *per se*. 53 Pa. 418; 2 W. & S. 408.

Mental suffering alone is no cause for action unless special damage be shown. 126 Pa. 164; 147 Pa. 40; 63 Pa. 290.

OPINION OF THE COURT.

It seems that O'Leary had loaned to Henry the sum of $25. Several weeks after it ought to have been paid, O'Leary in a public manner asked H. for the sum due. Upon being thus dunned, H. superciliously declined to pay. At this refusal O'Leary became piqued and said "No man would refuse to pay a sum of money borrowed, if he were not a thief." As a result H. alleges that he had been called a thief. The transaction was in the presence of two witnesses only.

There were two assignments of error to the proceedings before the court below, and both to the charge of the judge.

In dealing with these exceptions it will be necessary to consider the alleged defamatory clause and to determine how this clause should be understood. It is a general rule that the court will understand language as the rest of the world understands it, and when expressions assume a defamatory and slanderous, when spoken ironically or otherwise, and they do impute a crime; or if in consequence of other words spoken at the same time, and if all the words taken together do impute such a crime, the court will so understand it without the aid of averments and inuendoes, and will as a conclusion of law hold the words actionable in themselves. When the defendant has used only ordinary English words, trial judge can determine at once whether they are actionable or not. The court below found the clause "No man would refuse to pay a sum of money borrowed if he were not a thief," *prima facie* actionable, and in this there was no error, as will be seen by a comparison with several authorities. In Stees v. Rumble, 27 Pa. 112, we find these words, "A man that would do that would steal," these words are clearly not *prima facie* actionable *per se* since the obvious meaning is that under certain circumstances the defendant might steal, but the proposition does not say that he has stolen. In Kerr v. Atticks, 20 Pa. C. C. 335, the words charged are "Any one that would do that is a thief," "that" referring to some act done by the plaintiff. These words were held to be actionable *per se*. In determining whether the alleged words in the case at bar are actionable *per se*, we must first determine the relation between the words in that case [20 Pa. C. C. 335] and the one at bar. For the sake of convenience we will contract the clause in the case at bar to the form of (1) "No man would do that if he were not a thief," that, referring to "refusing to return a sum of money borrowed." This new proposition (1) we will compare with that stated in 20 Pa. C. C. 335, which is (2) "Any man that would do that is a thief." To prove these propositions identical requires only the application of the simplest rules of logic. Proposition (1) is a universal negative while (2) is a universal affirmative, both are in the hypothetical form. Changing (1) to the specific or categorical form we have "No case of a man's doing that is the case of a man not being a thief." By immediate inference from this last proposition we have "The case of a man's doing that is the case of his being a thief." Now by changing this inferred proposition from the categorical to the hypothetical we have "Any man that

would do that is a thief." By this process we have shown the two original propositions [(1) and (2)] to be identical, and therefore the words, "No man would refuse to pay a sum of money borrowed if he were not a thief" is *prima facie* actionable.

Before deciding upon the first assignment of error it will be necessary to examine the nature of the last action for slander. The action lies because one of the absolute rights of the person has been traversed. No man may disparage or destroy the reputation of another. The reputation of a man is that degree of esteem in which he is held by his fellow men. Words which defame his character and lessen this esteem, with a few exceptions, when made known to third parties constitute slander. Would, then, it not be possible for words charging a crime and actionable *per se* to be spoken under such, that upon proof of such circumstances, the defendant would have an absolute defense? For example, if spoken in a language unknown to hearers, or if the third parties were *all* deaf. Would the case be changed if all the hearers understood the language and heard perfectly, but afterward testified that to their minds no crime was imputed? Upon examination of the books we find this to be the law as interpreted by a well adjudicated case in England, and also similarly decided in a number of the States. The first case of the kind is reported in 2 Car. & Kis. 440, Hankison v. Belty. Here the words were "You are a thief. You robbed Mr. L. of 36£." They were spoken at a public toll gate while the defendant was passing through There was a number of witnesses, some of whom testified that they knew that the words did not impute a felony. The remaining witnesses were not to be found or at least were not called. In deciding the case it was said, "If *all* the hearers had so testified it would have been a perfect defense." In North Carolina we find the same rule adopted by the courts in Stoddard v. Lowell, 3 Hawks 474. New York has also established the rule in Kennedy v. Gifford, 19 Wend. 296.

This rule is undoubtedly founded upon principle and we see no reason why it should not be adopted by this court. We therefore find no error in the charging of the learned judge below. But according to the weight of authority the converse of this rule is not true and it does not follow that words are actionable merely because they were understood by those hearing them to charge a crime. [See Dixson v. Stewart, 33 Iowa 125]. Since the defendant is not guilty of slander the question of damages is irrelevant, and it is therefore unnecessary to take up the second ground for a new trial.

New trial refused. HAMBLIN, J.

OPINION OF THE SUPERIOR COURT.

The first error urged against the judgment below is that the court refused, on request, to tell the jury that, though the bystanders did not believe that O'Leary was intending to charge Henry with having stolen anything, yet, if O'Leary intended that they should so believe, he was guilty of slander. Should the court have given the instruction?

(1). The words could not reasonably have been understood to impute theft to Henry. Henry had just superciliously declined to pay a debt. Thereupon O'Leary told him that he was "a thief for acting so;" that "no man would refuse to pay a sum of money borrowed if he was not a thief." It distinctly appears from the words and circumstances that O'Leary was not charging that any theft had been committed, save the refusal to pay a debt. He was, in substance, saying that to refuse to pay a debt was to steal, and to steal was to be a thief, or, that, in his opinion, a man who refused to pay a debt was dishonest, and would steal, on occasion. Under neither interpretation would the words be actionable *per se;* not under the first, because the words show what the act attributed to Henry was, and that it was not a theft; *Cf.* 18 Am. & Eng. Encyc. 887, 888; not under the second, because to express the opinion that one who, it is alleged, has done one thing, *would* steal, etc., is to impute a tendency, a willingness to steal, and not a theft. Steese v. Kemble, 27 Pa. 112; 18 Am. & Eng. Encyc., 890. If Kerr v. Atticks, 20 Pa. C. C. 233, was intended to decide differently—as it was not—we would not be able to follow it.

Since the words used do not bear the interpretation by which they would impute a crime, the court properly refused to allow the jury to say that they did impute a crime. *Cf.* Colbert v. Caldwell, 3 Gr. 181.

(2.) But, even if the words might bear the sense of imputing a crime, they are not actionable, unless they in fact bore that sense. But, to bear a sense does not mean that the speaker intended in expressing them to charge a crime, nor that he intended those who heard them to understand that he charged a crime. They must in fact have understood that he intended to charge a crime. The essence of the slander is the actual derogation from the reputation of a man which springs from the fact that another causes his auditors to understand that he imputes an improper act. Hence, when the words are ambiguous, or in themselves unintelligible, resort can be had to the circumstances under which they were uttered, as known to the hearers, for the purpose of showing what sense they would and did attach to them. If the circumstances negative their understanding the words in the slanderous sense, or if it expressly appears that they did not so understand them, no slander has in fact been committed. *Cf.* Hankinson v. Bilby, 2 Carr & Kerivan, N. P. 439.

But, even if the utterer of the words would be liable for the sense that he intended them to bear, although that was not the sense which his hearers supposed him to intend, the court properly refused to affirm the point, because there was no evidence that O'Leary intended any other sense than that which his hearers attached to the words.

The second request for instructions was to the effect that the plaintiff was entitled to compensation not merely for injury to his reputation, but for the wound to his own feelings occasioned by the malice of O'Leary. On the theory that the animus of the slanderer may itself cause pain to the slandered, and that the pain is a ground of compensation as well as the injury to reputation. 18 Am. & Eng. Encyc. 1083, some courts have allowed the jury to consider the degree of express malice, in appraising compensation. Faxon v. Jones, 176 Mass. 206. Inasmuch as there was no slander proven for which any damage was obtainable, no error was committed by the court in refusing to say that damage was allowable for its subjective consequences. Nor should we think a sound policy justified a jury in giving damages to a man who insolently refused to pay a debt when it was demanded, on the ground that disagreeable emotions had been awakened in him by the somewhat too emphatic characterization of his conduct by the outraged creditor.

Judgment affirmed.

KNOLL vs. ANTHON.

Liability of guarantor—Insolvency of principal—Laches of guarantee—When discharged.

STATEMENT OF THE CASE.

On January 1, 1890, William Norris sold to plaintiff, a judgment against Mary Smith, which was payable one year after date. Knoll, doubting the value of the security, induced Morris to have his friend Anthon protect him. Defendant gave a paper under seal in which he promised to pay the same at maturity in case the money was not obtained from Mary Smith. In January, 1891, Mary Smith's property was sold by a prior lien creditor, and nothing was paid to Knoll. This action is brought, January, 1901, to recover from Anthon for the loss sustained, $1,000, with interest from January 1, 1890.

PHILIPPS and WRIGHT for plaintiff.

Nothing but clear evidence of fraud or *mala fides* can impeach the *prima facie* title of a holder of negotiable paper taken before maturity. Yard v. Patton. 13 Pa. 278, Marsh v. Marshall, 53 Pa. 396.

By virtue of the instrument given by Anthon being under seal, a consideration is unnecessary. 7 Kulp 409, 135 Pa. 565.

YEAGLEY and PEIGHTEL for defendant.

Laches, on the part of the creditor to notify surety of the default of the principal will discharge the surety. De Colyer's Law of Guarantees, p. 304; 2 Taunton 206.

The guarantor of a note will be discharged by a neglect of the holder to demand payment of the maker, and to give the guarantor notice of non-payment, provided the maker was solvent when the note became due and has since become insolvent. Oxford Bank v. Haynes, 8 Pick. 423, Cannon v. Gibbs, 9 S. & R. 202, Douglass v. Reynolds, 7 Peters 113.

OPINION OF THE COURT.

The first and most important question that confronts us in this case is the relationship of the parties. To its determination, therefore, we shall devote some discussion. The defendant stands related to the plaintiff either as a surety or a guar-

antor. If in the former capacity, then there is no doubt as to his liability; but if in the latter, then a different and more dubious question presents itself for consideration. In *Bouvier's Dictionary*, a suretyship is defined as "An undertaking to answer for the debt, default or miscarriage of another, by which the surety becomes bound as principal, or original debtor is bound." It differs from a guaranty in the fact that a suretyship is a primary obligation to see that a debt is paid, while a guaranty is a collateral undertaking, essentially in the alternative to pay the debt if the debtor does not. 24 Pickering 252. The difference between suretyship and guaranty has been expressed as follows: "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is the original promisor and debtor from the beginning, and is held, ordinarily, to know every default of his principal. Usually, he will not be discharged either by the mere indulgence of the creditor, or by want of notice of default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often supported on different consideration than that supporting the contract of his principal. The original contract of his principal is not his contract, and he is not bound to take notice of its non-performance." Reigart v. White, 52 Pa. 525; Chatham Nat. Bank v. Proll, 135 N. Y. 423.

From an examination of the above principles it is clear that Anthon's contract is a guaranty. It was made after that of Mrs. Smith; it is supported by different consideration; the principal is not a party to it; it is collateral to the principal contract; and is an engagement to pay if the principal does not, thus possessing all the elements of a guaranty.

Now, we shall proceed to ascertain the character of the guaranty and the liability of the guarantor. There are two kinds of guaranty, absolute and conditional. An absolute guaranty is an unconditional promise of payment or performance on default of the principal. A conditional guaranty is when there is some extraneous event beyond the mere default of the principal by which the guarantor is bound. The following agreements have been construed as absolute guaranties: "For value received I hereby guarantee the payment of within note at maturity." Ford v. Hendericks, 34 Cal. 673. "For value received we guarantee within note until paid." City Savings Bank v. Hopson, 53 Conn. 453. These agreements, it will be observed, contain no provisions. In Ordman v. Lawson, 49 Pa. 135, these words were said to be a conditional agreement: "We will pay the note providing you cannot collect it from them." And in Eby v. Bibb, 4 Ky. 71, these words were also construed as a conditional agreement: "We guarantee the ultimate payment of within note."

The distinction between an absolute and a conditional guaranty is drawn because the rules of law governing one is different to the rules of law governing the other. In a conditional guaranty it is necessary that the guarantee should give notice of the default of the non-payment of the debtor whose debt was guaranteed, unless it appears that the debtor was insolvent when the debt was due. Gibbs v. Cannon, 9 S. & R. 202; Follimer v. Dale, 9 Pa. 83. In an absolute guaranty no such notice is required. Campbell v. Brook, 46 Pa. 243.

A review of these cases convinces us that Anthon's guaranty is conditional. Therefore, an examination of the law governing a conditional guaranty is necessary in order to ascertain whether or not he can be held on that contract.

In 2 Taunt. 202, it was decided that a guarantor is entitled to notice of default of the debtor, if the parties to the bill are not insolvent at the time it was due.

In Gibbs v. Cannon, *supra*. Duncan, J., in discussing this point said: "I think upon a review of these cases the line is clearly marked. It is this, the guarantor is discharged if notice is not given to him of non-payment so that he may avail himself of the want of proper presentment, and demand due notice of non-payment if the maker of note, when maker and endorser or either of them is insolvent, at time note became due. But when insolvent that would be *prima facie* evidence that a demand upon them and a

notice to the guarantor would be dispensed with, the presumption being that the guarantor was not prejudiced by want of notice."

It does not follow, however, that the guarantor is discharged from liability on the guaranty because of failure to give notice. In order to be discharged from his liability, he must prove that he actually suffered loss or damage because of the failure to give notice. Overton v. Tracey, 14 S. & R. 311; Follum v. Dale, *supra;* Page v. Parke, 8 Gray. 211. And then he is discharged only to the extent of the damage sustained. Reynolds v. Douglas, 12 Peter 497; Phelton v. Pol, 2 Howard 457. The burden of proving solvency, and injury flowing from want of notice is on the guarantor. Gibbs v. Cannon, *supra.* Renolds v. Douglas, *supra.*

Applying the above principles to the case, we conclude that the plaintiff must recover. From the case stated, it appears that no notice of default was given the guarantor, and that Mrs. Smith was solvent when the note became due. The only statement in the case that refers to her financial condition was that her property was sold by prior lien creditors and nothing was paid to Knoll. To infer from that statement that she was insolvent would be unwarranted and injudicious. Neither does it appear that Anthon, the guarantor, suffered any loss or damage, because of Knoll's failure to notify him of Mr. Smith's failure to pay. As the burden of proving such loss or damage was upon him and he failed to prove it, we must presume that no loss was suffered. Therefore, judgment is entered for the plaintiff for the amount of the note, $1,000, and interest from the year 1891. WALSH, J.

OPINION OF THE SUPREME COURT.

Knoll took an assignment from Norris of a judgment against Smith, payable one year after the assignment apparently. Anthon gave to Knoll a paper under seal, wherein he promised Knoll to pay the judgment, "at maturity in case the money was not obtained from Mary Smith." The money was not obtained from Mary Smith, and very shortly after it should have been paid, this action was brought against Anthon.

It is not important to classify Anthon's contract, as suretyship or guaranty. We need simply to know what he promised to do. Did he promise to pay the debt if, after its maturity, executions should prove Smith insolvent, or if, after maturity he should be notified of Smith's default, or on any other contingency than that of the non-payment at maturity? The perusal of the contract answers the question. Anthon agreed to pay the money "at maturity" if it was not then paid by Smith. Instantly on the arrival of January 1st, 1891, it became his duty to pay if Smith did not. This duty he has neglected to perform. McBeth v. Newlin, 15 W. N. C. 129; Campbell v. Baker, 46 Pa. 245; Roberts v. Riddle, 79 Pa. 468; Zahm v. First National Bank, 103 Pa. 576; Pingrey, Suretyship, p. 3.

The learned court below, having classified the contract as a guaranty, concludes that notice of non-payment ought to have been given, but that omission to give it not being shown to have wrought any injury is venial. We think that notice was unnecessary. Anthon had promised to pay at maturity, and he was bound to know that Smith had not paid. The duty to pay was not contingent on the doing by Knoll of any act.

Judgment affirmed.

STONE vs. STEESE.

Record in a criminal case as evidence in an action of trespass—Trespass for conversion after conviction of larceny.

STATEMENT OF THE CASE.

On information of Stone, Steese was arrested for larceny of four sheep, was tried, convicted and sentenced to six months in jail. The indictment charged Steese with the felonious taking, etc., of four sheep, the property of Stone. Stone, subsequent to the discharge of Steese, brought trespass for the conversion of the sheep. The witnesses whose testimony had led to the conviction of Steese, were, two of them dead and the third had gone to Australia. Stone relied on the record in the criminal case to prove the stealing. Admitted. Verdict and judgment for $40.

JAMES and BERKHOUSE for plaintiff.

The parties in a criminal prosecution being different from those in a civil action,

a verdict in a criminal case cannot be used to establish facts in a civil suit. Jones v. White, 1 Strange 68; Hutchinson v. Bank, 41 Pa. 42. Betts v. New Hartford, 25 Conn. 185; Mead v. Boston, 3 Cush. 404.

There must be identity of parties in interest to render a record in one case admissible in another. Tearn v. West Jersey Terminal Co., 143 Pa. 122.

COOK and BRUNDAGE for defendant.

Evidence given in a former trial involving the same issues, and between the same parties, is admissible when the witness cannot be again obtained. 4 S. & R. 203; 81 Pa. 114; 137 Pa. 23; 144 Pa. 126.

OPINION OF THE COURT.

The only question raised in this case is, whether or not the court erred in admitting the record of a criminal prosecution in this subsequent civil proceeding. It was admitted, however, and it becomes our duty to examine the various statutes relating to the rules of evidence in civil and criminal cases, and from this source to determine, if possible, whether this record was properly received. The Act of May 23, 1887, says that a record is admissible when it is shown that the parties are the same and the same issues involved. Thus a record of a criminal action will be competent in a subsequent criminal action, providing there is identity of parties as well.

The record alone in this case could have been properly admitted to prove the fact that judgment was rendered or the verdict given against Steese, but could not be made the entire foundation of the plaintiff's case in the civil action; and since no evidence was produced whatever upon the trial of the civil action, judgment was improperly rendered against the plaintiff, if the record was all that was offered, for there is a material difference between proving the existence of a record and using the record as a medium of proof of the matters of fact recited in it.

In support of this position we quote Sections 537 and 538, in part, of first volume of Greenleaf on Evidence: "It is obvious that, as a general rule, a verdict and judgment in a criminal case cannot be given in evidence in a civil action to establish the facts upon which it was rendered. If the defendant was convicted, it may have been upon the evidence of the very plaintiff in the civil action, and if he was acquitted, it may have been by collusion with the prosecutor." "But besides this, and upon more general grounds, there is no mutuality, the parties are not the same. The defendant could not avail himself in the criminal trial of any admissions of the plaintiff in the civil action; and on the other hand, the jury in the civil action must decide upon the mere preponderance of evidence, whereas, in order to a criminal conviction, they must be satisfied of the party's guilt beyond any reasonable doubt. The same principles render a judgment in a civil action inadmissible in a criminal prosecution. In the former case the record can never be considered as *res inter alios acta;* the judgment being a public transaction, rendered by public authority, and being presumed to be faithfully recorded." The several cases cited by counsel for and against the admission of this record are given in connection with the statement of facts attached, and a careful examination of the respective citations has failed to convince us that the record should have been received. The judgment is set aside and now judgment is entered for the defendant.

WATSON, J.

OPINION OF THE SUPREME COURT.

The action being for the theft of four sheep, the plaintiff found himself without witnesses. There had been a prosecution of Steese for the same theft, at the trial of which three witnesses had testified for the commonwealth, and upon their testimony he was convicted. At the trial of the civil action, the plaintiff, not being able to produce any of these witnesses, offered the record of the conviction in evidence. It was received, but, on a motion for a new trial, the judgment was set aside, and ultimately a judgment was entered for the defendant.

A principle is, that a judgment can estop only those who are parties to the issue in which it is rendered, and, generally, that when it does not estop, neither is it evidence against a person. Another principle is that estoppels must be mutual. One party to an issue will not be estopped by an adjudication, unless the other party is likewise estopped. From the application of these principles, it results that a conviction of a crime does not estop the defendant as against any one other than the commonwealth, and that an acquittal

estops only the commonwealth as against the defendant. Hence, an acquittal of X, of a charge of larceny of A's property is no bar to a civil suit by A against him for the conversion of that property. Hutchinson v. Bank of Wheeling, 41 Pa. 44. The dismissal of a proceeding for surety of the peace against a husband, begun at the instance of the wife, was no bar to her subsequent libel for divorce on the ground of cruelty, Breinig v. Breinig, 26 Pa. 161; *Cf.* Hahn v. Bealor, 132 Pa. 253. [There was, however, another objection to the use of the record.] The conviction of Steese, while unimpeachable evidence of his having stolen the sheep, for the commonwealth, cannot be esteemed decisive of his guilt in favor of Stone.

But, can Stone use it as evidence, and, as evidence, would it be sufficient to support a verdict in his favor? The learned court below has decided negatively. It cannot, we think, be deemed a settled question whether a conviction of theft of A's goods would be *prima facie* evidence of that theft in a civil suit by A for the value of the goods. In Bennett v. Fulmer, 49 Pa. 155, a conviction of the defendant in ejectment of a forcible entry upon and detainer of the same premises was excluded, with the approbation of the Supreme Court. "It was between different parties," says Thompson, J., "and the plaintiffs were the prosecutors and witnesses." [In Summers v. Bergner, etc., Brewing Co., 143 Pa. 114, the action was for injury to plaintiff's child by the negligent driving of the defendant's driver. The plaintiff alleged that the driver was asleep. The defendant offered to show that the plaintiff had prosecuted the driver for assault and battery on the child, and that "at that time there was no contention on the part of Mr. Summers that the driver was asleep." For some obscure reason, this evidence was excluded by the court, without censure from the Supreme Court].

Although there is probably a preponderance of decision, in favor of the exclusion of the conviction as even *prima facie* evidence in a subsequent civil action, there are cases of the contrary tenor. In Anderson v. Anderson, 4 Me. 100, and Randall v. Randall, 4 Me. 326, it was held that in a divorce proceeding, the fact of the marriage between the parties, and the fact of the respondent's adultery, could be proven by means of a former conviction of adultery. In Maybee v. Avery, 18 Johns. 352, an action of slander for charging Maybee with theft, it was held that Avery could prove Maybee's conviction of the theft, because Maybee had had the opportunity to cross-examine the Commonwealth's witnesses, and because Avery was not one of these witnesses.

That a conviction is highly persuasive evidence of guilt is entirely clear. The common law held it a bar to the convict's testifying in collateral proceedings plainly on the theory that it implied guilt, and guilt implied incredibility. The Act of June 1, 1891, 1 P. & L. 1635, authorizes divorce on the ground that the respondent has been convicted of an infamous crime and sentenced to a term of imprisonment exceeding two years. If the State, even at present, denies to a party the evidence of one who has been convicted of perjury, if it will dissolve the marital bond, because one of the spouses has been convicted of a serious crime, it must do so on the hypothesis that conviction is sufficient evidence of guilt to justify important collateral action.

Steese was charged by three witnesses, with the theft. They were sworn. He had a chance to cross-examine them. Had these witnesses been before the court in the trial of the civil cause, he could have done no more. In the prosecution, his liberty was at stake, to say nothing of the ineffaceable brand which a sentence would put upon him. His incentive to sift the adverse testimony by cross-examination was greater than in a suit involving but $40. He had a stronger reason to command such witnesses as could prove an *alibi*, or otherwise rebut the evidence of his guilt, than in the present cause. Nor, can it be objected that the evidence of Stone contributed to the conviction, for Stone was not a witness. Death has destroyed two of the witnesses, and the third has gone to Australia. Besides all this, the bias of a criminal jury is stronger for the defendant than that of a civil jury on the same evidence. The former cannot properly convict without satisfaction of guilt beyond a reasonable doubt. Every man of the jury is under a duty to acquit, although he believes the defendant guilty,

unless that belief reaches a high degree of constancy and strength. But, in a civil action, the slightest preponderance requires of him a verdict for the plaintiff, although the recovery is founded on a crime. We think, then, that it would be expedient to adopt the principle that the conviction of a crime is *prima facie* evidence in a civil action which, or the defense against which, is founded on the same criminal facts.

The husband of a deceased woman, as tenant by the curtesy, brought ejectment against her executor, who defended on the ground that the plaintiff had deserted his wife for a year before her death, and so forfeited his curtesy. The executor put in evidence the record of a prosecution against him for desertion, which resulted in his being sentenced to pay his wife seven dollars per week. Her death occurred less than four months subsequently. The Supreme Court approved of the admission of the record as "persuasive, but not conclusive evidence of a previous desertion by the husband." Hahn v. Bealor, 132 Pa. 242; Bealor v. Hahn, 117 Pa. 169. *Vide* remarks on Bauder's Appeal, 115 Pa. 480.

Our attention has been called to no Pennsylvania case which conflicts with this unless it be Bennett v. Fulmer, 49 Pa. 155, *supra*.

It may not be improper to note the fact that the 179th section of the act of March 31st, 1860, 1 P. & L., 1403, provides that in addition to other penalties, one convicted of theft shall be adjudged by the criminal court to restore to the owner the property taken, or to pay the value of the same. The sentence, therefore, inures to the benefit of the owner of the stolen goods. No plea was made in the court below, that the sentence of the oyer and terminer was a former recovery, and as such barred the civil action. If then the owner collaterally recovers his goods or their value, in the prosecution, we see no grave objection to his using the conviction in support of a civil action for the property stolen, if for any sufficient reason, he feels impelled to resort to one.

Judgment reversed with *v. f. d. n.*

ALLEN vs. TRIPP.

Covenant of general warranty—When covenantee's grantee may sue.

STATEMENT OF THE CASE.

Tripp, owning land, except the coal under the surface which had been conveyed away, conveyed to Lloyd by metes and bounds, not excepting the coal, with covenant of general warranty. Lloyd knew that the coal had been previously conveyed and that it was not the intention of Tripp to effect to convey to Lloyd the coal.

Lloyd in turn conveyed to Jackson, making no exception of the coal, but giving no warranty. Jackson supposed that he was getting and that Lloyd was intending that he should understand that he was getting the coal. Jackson subsequently conveyed the tract to Allen with general warranty. Allen discovered that O. Holmes was the owner of the coal and was mining it from a mine opening into next tract. This is an action on Tripp's covenant.

YEAGLEY and WILSON for plaintiff.

Cited 46 Pa. 233; 68 Pa. 400; 141 Pa. 312; 135 Pa. 411.

HURGUS for defendant.

Cited 107 Pa. 408; 24 N. J. Eq. 206; 117 Pa. 67; 147 Pa. 562.

OPINION OF THE COURT.

The case stated is as follows: Tripp received title to a tract of land, described by metes and bounds, with a reservation of all the coal underlying the tract.

The validity of such a conveyance, with a reservation, cannot be denied. The cases are too numerous to cite when mineral and timber rights have been reserved in the vendor and disposition made of everything else.

Tripp then conveyed to Lloyd, describing the land by metes and bounds, without any reservation, and gives Lloyd a general warranty of title and possession.

Lloyd knew, when he took the conveyance from Tripp, that Tripp had no title to the underlying coal and knew, too, that Tripp did not intend to convey the coal to him.

Lloyd then conveyed to Jackson without reserving the coal, but giving no warranty, but Jackson supposed he was buy-

ing the coal with the land, and that Lloyd intended that Jackson should believe he was purchasing the coal, and would get it. Jackson afterward conveyed to Allen with a general warranty, presumably with no reservation in the deed, and without knowledge on Allen's part that anyone else had a right to the coal. After Allen had received the conveyance he discovered that Holmes was the owner of the coal, and was mining it by a shaft opening into an adjacent tract. Allen sues Tripp on his covenant of warranty.

The question is, can he recover, and if so, what?

The case is somewhat involved by reason of the knowledge of two of the persons in the chain of title of the reservation of the coal, and by reason of there being no warranty in Lloyd's deed to Jackson.

We do not see that these facts materially affect the decision of this case. Tripp gives a general warranty to Lloyd, which, on account of Lloyd's knowledge of an outstanding title to the coal, is worthless to Lloyd as against damage done by mining the coal by the lawful owner.

Then Lloyd conveyed to Jackson without warranty. Then Jackson conveyed to Allen, who has no knowledge, and gives Allen a general warranty. Allen supposes he is the owner of the coal, and has made his investment with that belief, and perhaps by reason of it. He is evicted from the coal by a person who claims it lawfully. He certainly has a remedy. The question is, can he sue Tripp on the general warranty in his deed to Lloyd?

A general warranty in a Pennsylvania deed is a covenant to defend the purchaser, his heirs and assigns, against damage from all persons lawfully claiming or to claim the land in question. The cases are numerous on this point.

It is plain to be seen that there was an eviction by the mining of the coal, also a breach of warranty. 164 Pa. 115; 14 Pa. 336; 3 S. &. R. 407. A covenant of warranty runs with the land. 3 P. & W. 313.

We can see no escape by Tripp from liability under the facts stated, and therefore direct the jury to find a verdict for Allen, and assess as damages the loss actually sustained by Allen by reason of Holmes mining the coal. Beauplan v. McKeen, 28 Pa. 124.

CONRY, J.

OPINION OF THE SUPREME COURT.

In Pennsylvania, doubtless it could be shown, were the action by Lloyd upon Tripp's covenant, that Lloyd knew when he accepted the conveyance from Tripp that Tripp did not own the coal and was not undertaking to convey it, and Lloyd could not treat the subsequent eviction from the coal as a breach of the warranty. Stafford v. Giles, 135 Pa. 411.

The warranty is made to run with the land. Allen knew that it had this property. He knew that Lloyd's guarantee of the land would interpret the written warranty without the aid of the facts that were known to Lloyd himself. We think these facts could not be proven against Allen, in the absence of proof that he was aware of them before he bought the land from Lloyd. Suydam v. Jones, 10 Wend. 181. Had the warranty originally been applicable to the coal, Lloyd might have released it while still the owner of the land. Such release, if unknown to Allen, would, we think, have been inoperative as against him. Brown v. Staples, 28 Me. 503, although a different opinion is expressed in Martin v. Gordon, 24 Ga. 536. We agree, therefore, with the learned court below in the conclusion that the interpretation of the covenant, which, as concerns Lloyd and Tripp, would be admissible, is inadmissible as concerns Tripp and Allen.

But, Allen cannot maintain a suit on Tripp's covenant of warranty unless that covenant ran with the land. It ordinarily thus runs with the land. There are cases, however, which hold that it does not run unless the covenantor had a title to the land, at least the title which consists of possession, or seisin. Moore v. Merrill, 17 N. H. 75; Hacker v. Stover, 8 Me. 228; Burtnoes v. Keran, 24 Gratt. 42; Beddóe v. Wadsworth, 21 Wend. 120 (*Cf.* Mygatt v. Coe, 142 N. Y. 78.) "If the grantor has no title and is not seised of the land when he makes his deed of conveyance, his covenant of warranty does not attach to the land and run with it, and he therefore is not liable to an action by an assignee of his grantee for the breach of such covenant" 8 Am. & Eng. Encyc. 149.

There was a title to, and a seisin of, a part of the land embraced in the description of the deed. There were none, as to the coal, which was another part of that

land. In Slater v. Rawson, 1 Metc. 450, the grantor, while seised of much the larger part of the land conveyed, had no seisin or ownership of about 22 acres embraced in the deed. It was held that the grantee of his grantee could not maintain an action on the warranty for a subsequent eviction from these 22 acres. *Cf.* Slater v. Rawson, 6 Metc. 439. In Moore v. Merrill, 17 N. H. 75, A conveyed with warranty to B three undivided fourths of a tract, and B afterwards conveyed to C, and C to D. D then conveyed, with warranty to A. A had, at the time of his conveyance to B, only an undivided half. He brought an action against D on his covenant, and it was held that D's right to defalk A's liability on his covenant to B depended on the seisin or want of seisin of A, at the time of his conveyance, of the one-fourth, the eviction from which was the occasion of the action. If the principle of these cases is sound (and we are aware of nothing in the decisions of this State, that is inconsistent with it), it follows that Tripp's covenant, as respects the coal, did not run with the land, and that Allen can sustain no action upon it.

It is to be regretted that the investigation of the learned court below was not more extensive, and that the extremely interesting and important questions involved in the case did not compel a more searching study of the authorities.

Judgment reversed.

HENRY vs. DAVIS.

Trespass for cutting timber—What constitutes possession—Public and private ways distinguished—Grantee's interest in way depends on boundary line—Burden of proof on defendant to justify the trespass—Act of March 29, 1824, P. & L. Digest, p. 4707.

STATEMENT OF THE CASE.

William Henry has been the owner in fee for thirty-seven years of a lot of ground in the village of Hall. The deed to this lot calls for an alley twelve feet wide on the east side. John Davis is the owner in fee of a lot of ground east of that owned by Henry. His deed calls for an alley twelve feet wide on the west side.

The village of Hall is *unincorporated*. The streets and alleys are all marked in the original plan of the village. The alley above referred to has never been opened; it is and always has been enclosed in the lot owned by Henry.

A fence divides the alley from the lot of Davis. This fence is kept in repair by both of the parties. A number of locust trees, about six inches in diameter, stand in the alley, which is enclosed in the lot of Henry, at a distance of eight inches from the fence and the lot of Davis. Davis, standing on his land, cut down two of the trees. Henry claims that he is owner of the land on which the trees have been cut, and is therefore entitled to damages. Can he recover?

CANNON and KLINE for plaintiff.

A continuous adverse possession for twenty-one years gives a title to land, which is valid not only by way of defense, but sufficient to recover upon in ejectment. Pederick v. Searle, 5 S. & R. 241; McCall v. Neely, 3 Watts 73.

The possession may be adverse by enclosure of the land without residing on it. Johnson v. Irwin, 3 S. & R. 291.

EBBERT and SCHNEE for defendant.

A person's title is not affected by non-user. Weaver v. Getz, 16 Superior 418; Lindeman v. Lindsey, 69 Pa. 93.

The entry upon a lane by one, whose deed called for boundaries embracing lane, and holding for twenty-one years, will not bar right of way of owner of lane. Bombaugh v. Miller, 82 Pa. 203.

OPINION OF THE COURT.

The question which presents itself for our consideration is, whether the defendant has been guilty of a breach of duty to the plaintiff by cutting the trees. The facts do not inform us as to whether the alley upon which the trees stood was a public or private one, and we will, therefore, consider the rights of the parties, firstly, by regarding it as a public, and, secondly, as a private alley.

When a parcel of land is granted, and a street or road is named as a boundary, the grantee takes title to the middle of the street, if the grantor had title to the middle. Paul v. Carver, 26 Pa. 223. However, an exception to this rule is recognized, and when the street which is named as the boundary is not yet opened, the grantee takes title only up to his line, the title to the street remaining in the grantor until it is opened. The grantee only acquires title to the street when it is opened, before which he has an easement over it. Hancock v. Phila., 175 Pa. 124; Cole v.

Phila., 194 Pa. 464. The alley being a public highway, and unopened, the paper title to it is in neither of the parties to this action; they merely have an easement over the bed of it. The plaintiff, however, is in possession of the whole alley, and his possession in itself is a sufficient title upon which to maintain trespass against all who disturb him in his possession, the owner and all who have a better title excepted. 2 Blackstone Comm. 196; 3 Washburn on Real Prop. 114; Graham v. Peat, 1 East 244; Slater v. Rawson, 6 Metcalf 445; Lund v. Parker, 3 N. H. 50. Blackstone, speaking of possession as a species of title, says: "Till some act be done by the rightful owner to divest this possession and assert his title, such actual is *prima facie* evidence of a legal title in the possessor." "Any possession is a legal possession against a wrong-doer," per Lord Kenyon, in Graham v. Peat, *supra*. In an action of trespass the defendant can never plead title in a third party without alleging a right derived from him; because a party having actual possession, but not the right of possession, has a good title against a party having none. Although the defendant's deed gave him an easement over the *locus in quo*, cutting timber or exercising any acts of ownership besides passing over the land are tortious, for which trespass will lie to the party injured. Sanderson v. Haverstick, 8 Pa. 294. Under the above case, knowledge that it was on the land of another was considered immaterial. See O'Reilly v. Shadle, 33 Pa. 489. We see no reason why distinction should be drawn between the case of Hancock v. Phila., *supra*, from the mere fact that the *locus in quo* was a street, whereas in the case at bar it is merely a public highway or alley. Even if the plaintiff and defendant took title to the middle of the alley under their deeds, the former has acquired, under the statute of limitations, a title to the whole, which the holder of the paper title cannot dispute. His title, however, is subject to the public's easement and right of use and enjoyment, as no private occupancy of a public highway for whatever time, either adverse or permissive, vests a title inconsistent with the public use. Phila. v. Railroad Co., 58 Pa. 253; Com. v. Moore, 113 Pa. 344. The defendant's property in the half of the alley is private property, and being such can be lost by adverse possession. The owner of land does not lose his right of entry, unless there has been an actual, continued, visible, notorious, distinct and hostile possession for twenty-one years.

The possession of the plaintiff has all these characteristics. The only one as to which any doubt can exist is the last, that is, the mark of hostility. Justice Rogers in Rung v. Shoneberger said: "If a person enters into possession of land of another and holds it, without more, the presumption is, he claims title. A possession under such circumstances would be adverse, and as such would give title." The law as it exists in Pennsylvania has been stated as follows: "Adverse possession is a possession inconsistent with the rights of the true owner, in other words where a person possesses property in a manner in which he is not entitled to possess it and without anything to show that he possesses it otherwise than as owner, that is without the intention of excluding all persons from using it, including the rightful owner, he is in adverse possession." See Sheaffer v. Eakman, 56 Pa.

In the language of Mr. Justice Gibson, approved of in Olewine v. Messmore, 128 Pa. 470. "The claimant must keep his flag flying and present a hostile front to all adverse pretentions." The case of Sorkin v. Sentman, 162 Pa. 543, is strikingly similar in many respects to the one at bar. The plaintiff and defendant were adjoining property owners, a house being built on each lot by a former owner. The plaintiff and his predecessors in title for thirty-seven years had exclusive and continuous possession of a space above and below the defendant's side hall, which space, in fact, was part of the defendant's house and to which he had a paper title, but nevertheless, the court sitting in equity, held that the defendant had lost all rights to the space and that the plaintiff had acquired a good title under the statute. Under the authorities we have come to the conclusion that the plaintiff's title under the statute is complete. If the alley was public as assumed, the plaintiff is entitled to recover. Considering it as a private way the parties took title to the centre. By force

of his possession for the reasons above given, the plaintiff has acquired a title under the statute of limitations, which the defendant, after remaining inactive for so long a time, is precluded from contesting. The facts being undisputed, the question of adverse possession is for the court. Rung v. Shoneberger, *supra.*

It is no defense to the plaintiff's action that the trespass was committed by the defendant while standing on his own land. It has been held to fire a gun into another's field is a trespass *quare clausum fregit.* Whether the alley is public or private the plaintiff is entitled to recover. Under the act of March 29, 1824, P. L. 152, section 3, the plaintiff is entitled to double the value of the trees.

Judgment for plaintiff.

GERBER, J.

OPINION OF THE SUPREME COURT.

This action of trespass presupposes that Henry was in possession of the *locus in quo* the trees stood, and were cut down, and that Davis had no better right to the possession of it than Henry.

For thirty-seven years the alley has been enclosed with Henry's lot. Possession is manifested by various acts, by cultivation, by enclosure, by residence, etc. The erection of a fence and its maintenance for thirty-seven years, are very significant acts of possession. The first condition of the right to maintain trespass is, hence, fulfilled.

Had Davis a better right to the possession than Henry? We are informed that the deed under which Davis claims, "calls for an alley twelve feet wide on the west side." This alley is in an incorporated village. It has never been opened. It was, therefore, not a public, but a private way, if a way at all. When such a way is called for as a boundary in a deed, the grantee takes no part of the way in fee, but only a right of passage over it. Spackman v. Steidle, 88 Pa. 453; Robinson v. Myers, 67 Pa. 1; Ensign v. Lyon, 1 Lack. Jur. 102; 4 P. & L. Dig. 6632.

Whether Davis's grantor owned the fee of the alley does not appear. If he did not, the fee in it could, it is hardly necessary to say, not pass to Davis. It does not appear whether the alley, or the side of the alley was called for as a boundary. If the latter, Davis would not be the owner in fee of a half of it, but would have only an easement of passage over it, even were it a public way, until it was actually opened. Gamble v. Philadelphia, 162 Pa. 413, Whitaker v. Phœnixville, 141 Pa. 327, Wayne Avenue, 124 Pa. 135, Hancock v. Philadelphia, 175 Pa. 124, Cole v. Philadelphia, 199 Pa. 464. It has never been opened.

The right of way, however, would entitle Davis to enter on the way, not only for passage, but for the removal of obstacles to passage, and if trees so stood in the way as to impede its use he would have a right to cut them down. Quintard v. Bishop, 29 Conn. 366; Dickinson v. Whiting, 141 Mass. 414; Gordon v. Taunton, 126 Mass. 349. *Cf.* Hartman v. Fick. 167 Pa. 18; Dyer v. Depui, 5 Wh. 584. It does not appear that the trees were an obstruction. They stood within eight inches of the Davis fence, and the alley was twelve feet in width. At all events, the burden was on Davis to justify what was an apparent trespass on the possession of Henry. Proving that he had a right of way, of itself, was no justification. Suspending gates at the exit of a way, is not *ipso facto*, an actionable obstruction, Connery v. Brooke, 73 Pa. 80; Demuth v. Annveg, 90 Pa. 181; and other objects may be within the boundaries of the way, without impeding its actual use.

Whatever right Davis may have had in the alley, has long since become extinct. The alley has been enclosed by Henry for thirty-seven years. During that time there has been a fence separating Davis' land from it, and preventing his walking or driving upon it from his lot. The ends of the alley have also been obstructed, not by gates, so far as appears, but by an immovable fence. During thirty-seven years a visible obstacle to the use of the way by Davis has existed, and he has even kept the fence in repair which prevented his getting upon the alley. At the time of the cutting of the trees, he had no right of way, Spackman v. Steidel, 88 Pa. 453, and the act was a trespass, for which the damages recovered below were only a just compensation.

Judgment affirmed.

TEMPLE vs. FARMERS' BANK.

Ejectment—Omission in scire facias of one piece of property embraced in mortgage—Right to issue subsequent scire facias—Estoppel.

STATEMENT OF THE CASE.

The bank took a mortgage for $2,500 on a town lot and farm. On a judgment on the mortgage a sale was had on the farm for $1,000. The *sci. fa.* did not mention the lot.

Temple, about to lend $200 to Philips on judgment, asked the teller of the bank what was due on the mortgage. He referred to a book kept by the bank in which was a record of mortgages and judgments, and finding that the mortgage from Philips was satisfied, showed the record to Temple. The record had been in the bank four months, during which time there had been fourteen meetings of the directors, at which the book had been present and examined for sundry purposes. Thereupon, Temple lent $200 to Philips, taking a judgment. He later issued execution, levied on the town lot, which was sold for $700, he being the purchaser. He was notified by the bank's agent before he bought that its mortgage was unpaid, and was a lien on the land. Subsequently the bank took possession of the lot. The sheriff, after accepting the receipt of Temple for $200, required him to pay the rest of his bid. The balance, after deducting costs, viz.: $433, was paid to Philips as owner. This is ejectment.

BROOKS and MINNICH for plaintiff.

The bank is estopped by act of its agent. Gray's Appeal, 10 W. N. C. 458; Buchanan v. Moore, 13 S. & R. 304; City of Philadelphia v. Matchett, 116 Pa. 103; 93 Pa. 376. To maintain ejectment plaintiff must show present right of possession. 32 Pa. 376.

STERRETT and RHODES, F. for defendant.

Omission by mistake in *scire facias* of one of properties embraced in mortgage does not discharge the lien of mortgage on the one omitted so as to give priority to subsequent creditor. Miller's Appeal, 11 W. N. C. 506; Evans v. Jones, 1 Yeates 172.

OPINION OF THE COURT.

The questions before us for determination are: Had the plaintiff the right to rely on the bank's record of the court records? Was he not negligent in failing to consult the proper records?

The Act of May 28, 1815, requires the recording of mortgages and deeds. Its very object and aim was to prevent and protect such acts, and the parties thereto, as the case before us involves.

Its object is to protect subsequent mortgages against previous mortgages. The courts, by construction, make the record of a mortgage notice to any subsequent mortgagees or lien creditors of the existence of the prior lien. This rule has been well settled in Lightner v. Mooney, 10 Watts 407, also in Evans v. Jones, 1 Yeates 172, and has been followed in all the later cases.

Secondly, the defendants allege that the bank is estopped from denying the representations made by the teller of the bank. There is no evidence that the bank gave any instructions to the teller to represent that their record was a certified copy of the court records; neither they, nor their agent, guaranteed its accuracy. It was for reference merely. We have no evidence that the bank transacted any business on the strength of this record. Further, that a mere announcement (as the bank's record was) of what is already open to the inspection of the public cannot operate as an estoppel, has been held in Williams v. Mullan, 1 Pittsburg L. J. 337; and, on the other hand, under these circumstances, an estoppel can only be claimed by one who has not only acted in ignorance of the true state of facts, but who is also without any means of informing himself of their existence. Cuttle v. Brockway, 32 Pa. 45.

Further, the plaintiff was the purchaser at the sheriff's sale, and upon his title, thereby acquired, he relies to bring this action. The bank did not take possession of the town lot until after he had purchased at the sheriff's sale, when they took possession. Why, then, does he bring this action against the bank and not Philips, who was undoubtedly in possession at the time of the sheriff's sale? In Yost v. Brown, 5 Kulp 111, the rule laid down is, that "if the plaintiff relies solely upon his title acquired by purchase at a sheriff's sale, he must prove defendant's possession at the time of the levy and sale." The plaintiff, therefore, relying on his title thus acquired, should have brought his action against Philips and defendant bank. Judgment is therefore entered for defendant.

TURNER, J.

OPINION OF THE SUPREME COURT.

The *scire facias* issued on the Philips mortgage mentioned only the farm, and not the lot, both of which were embraced in the mortgage. The judgment followed the *sci. fa.*, and the *levari facias* both. The farm accordingly was sold, but not the lot. Was the mortgage merged in the judgment, or did the recovery of a judgment against the farm, and a sale of the farm, destroy the right to enforce the mortgage as to the lot? It has been said that a bill to foreclose a mortgage must apply to all the premises mortgaged, because, otherwise, the defendant would be subjected to an unnecessary number of suits. Cooper's Equity, 184; Milford's Eq. Pleading, 183; 9 Encyc. Pl. & Pr. 375. It is evident that if the mortgagee can issue a *scire facias* to foreclose one piece of land to-day, and another to-morrow, and a third on the third day, he might oppress his debtor with costs. In the case before us the premises were distinct and separate before the mortgage was made. It does not appear that the omission of the lot from the *sci. fa.* was on the part of the mortgagee intentional, or, indeed, that he in any way, caused it. It may be presumed that the præcipe indicated the book and page in the Recorder's office where the mortgage might be found, and that, as usual, the prothonotary framed the *scire facias* from the mortgage, without collaboration of the mortgagee. The latter does not therefore lose the right to enforce the mortgage against the lot, either by taking the proceeds, should it be sold on an earlier lien—Miller's Appeal, 11 W. N. C. 506, or by issuing a second *scire facias*, or by taking possession of the lot.

After the sale of the farm, Philips confessed a judgment to Temple for $200 then lent to him. On this judgment a sale of the lot was made for $700, to Temple. The mortgage, still on the lot, was the first lien, and was not divested by the sale to Temple. The Farmers' Bank, as mortgagee, had a right to take possession, by ejectment or without, and apply the rents to its debt. Being thus in possession, Temple could not eject it until the mortgage debt had been repaid. But it was not necessary that the debt should have been repaid, at the institution of the suit. The bank had been in possession—how long does not appear—and it was its duty to account for the rents received by it. It follows that this account should have been taken, at the trial, and that the verdict should have been in favor of Temple, conditioned upon his paying the balance of the debt, ascertained by the jury to be due, in some reasonably short time—1 Liens 177; 3 Liens 182; but, as he does not allege payments since the sale on the *levari facias*, and furnishes no evidence of the length of the defendant's possession, nor of the rental value of the land, it was not error to suffer an unconditional verdict for the defendant, if the plaintiff has no other reason for recovering. Levick v. Bensing, 1 Mona. 592.

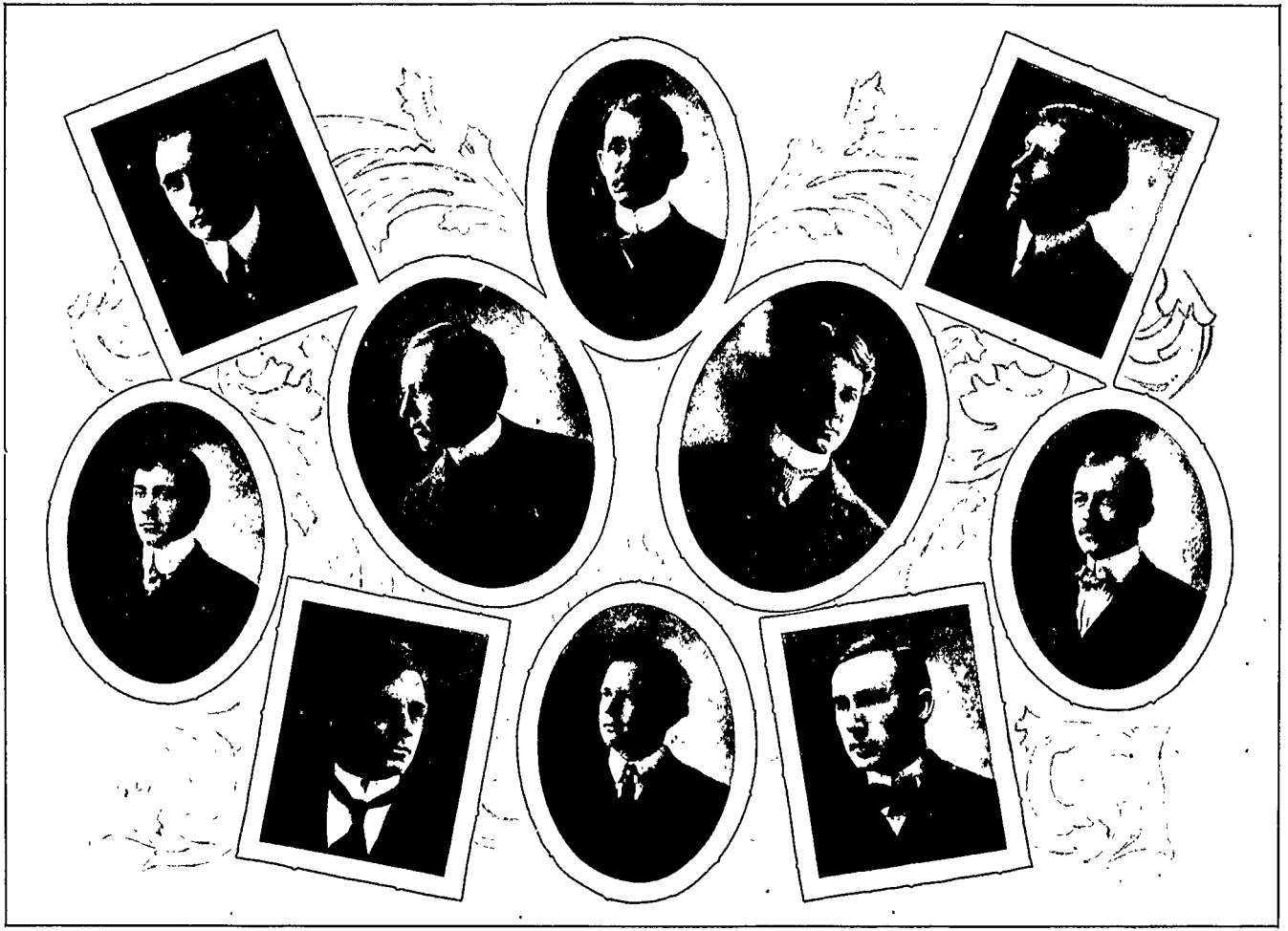
Temple alleges, as reason for his recovering, that, although the mortgage was not, as to Philips, discharged from the lot, it was discharged as to him, Temple, by estoppel of the Bank against asserting it About to lend $200, Temple inquired of the teller of the bank what was due upon its mortgage. The functions of the teller do not include that of giving such information. Zane, Banks and Banking, p. 155. The teller produced a book kept by the bank, in which was a record of its mortgages and judgments, and a statement that the Philips mortgage was satisfied. The teller showed this record to Temple, who, thereupon, lent $200, taking a judgment from Philips. Is the bank estopped from these facts? The record was kept by the bank for its own convenience, and not for the purpose of being inspected by strangers. Nor is there any evidence that it was in the custody of the teller, or that he was authorized to exhibit it to anybody. Had Temple applied to the directors, or possibly, to the cashier, and received the same information, the bank would probably have been estopped, since the circumstances indicated that Temple was intending to act on it. But we are unable to see how the teller, without authority additional to that which he ordinarily possesses, can destroy the property of the bank not put in his care by creating estoppels for it.

The book containing the record of the Philips mortgage and of its satisfaction, had been in the bank four months, and during this time it had been before the directors at fourteen meetings. It does

not appear that, at these meetings, they had noticed this particular entry, but if it did, and if therefore the entry might be regarded as their admission that their mortgage had been satisfied, it is an admission *not* made to Temple, still less made to him in order that he might act upon the assumption of its truth. Until it is shown that the book was kept in order that the teller might show it to inquirers, the fact that he showed it can in no wise prejudice the bank.

While we reach the conclusion that the judgment of the learned court below must be sustained, we do not quite agree with it as to the route by which it arrived at its decision. The principle cited from Yost v. Brown, 5 Kulp 111, is irrelevant. If Temple has a right to the possession, he may sustain an ejectment against any who is depriving him of it. Philips is not depriving him of it, the defendant is.

Judgment affirmed.



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